TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 283.

WEBSTER COAL AND COKE COMPANY, PETITIONER,

vs.

A. J. GASSAWAY, JOHN B. THAYER, CHARLES E. PUBLE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 30, 1907.
CERTIORARI AND RETURN FILED MAY 6, 1907.

(20,670.)

SUPREME COURT OF THE UNITED STATES.

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File No. 922.

Transcript of Record.

United States Circuit Court of Appeals for the Third Circuit, October Term, 1906.

No. —.

ALEXANDER J. CASSATT, JOHN B. THAYER, CHARLES E. PUGH, W. W. ATTERBURY, MICHAEL TRUMP, R. M. PATTERSON, J. G. SEARLES, GEORGE W. CREIGHTON, WILLIAM W. STRONG, OSCAR A. KNIPE, WILLIAM J. BINGHAM, A. E. FITLER, WILLIAM A. THOMPSON, CHARLES R. STRONG, CHARLES KINGSMORE, A. D. ROBERTS, and R. L. HEAD, Plaintiffs in Error,

vs.

WEBSTER COAL AND COKE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Filed May 8, 1906.

1 *Assumpsit.*

October Session, 1904.

WEBSTER COAL & COKE COMPANY

vs.

PENNSYLVANIA RAILROAD CO.

1905, January 24. Præcipe for summons filed. Summons exit returnable first Monday of February next. Statement of claim filed.

1905, January 26. Proof of service of copy of statement filed.

1905, February 9. John G. Johnson, Esq., appears for Defendant. Affidavit of defence filed.

1905, February 15. Summons returnable served.

1905, February 21. Rule to plea filed.

1905, March 11. Plea filed.

1905, April 11. Petition for an order on defendant, &c., to produce books, &c.

1905, April 11. Argued sur motion for an order on Deft. to produce books. Answer of Defendant filed.

1905, April 12. Order directing Defendant to produce certain papers, &c.

1905, April 14. Exceptions to order to produce books, &c., filed.

1905, April 14. Assignments of error filed. Petition and order

allowing writ of error. Writ of error allowed and copy thereof lodged in Clerk's office for adverse party. Citation allowed and issued. Citation returned, service accepted. Bond sur writ of error approved and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you between Webster Coal and Coke Company, and Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles,
2 George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head, a manifest error hath happened, to the great damage of the said Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 14th day of April, in the year of our Lord one thousand nine hundred and six (1906).

SAMUEL BELL,
Clerk of the Circuit Court of the United States.

Allowed,
BY THE COURT.
Attest:
SAMUEL BELL, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Webster Coal and Coke Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein
3 Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John B. McPherson, Judge holding Circuit Court of the United States this fourteenth day of April, in the year of our Lord one thousand nine hundred and six (1906).

BY THE COURT.

Attest:

(Signed) GEORGE BRODBECK, JR., *Pro Clerk.*

Service accepted—

(Signed) DAVID L. KREBS,
Att'y for Def't in Error.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Issue summons in Assumpsit in the above case, returnable to first Monday of February, 1905.

(Signed) THOS. H. ATHERTON,
Attorney for Plaintiff.

Jan. 11th, 1905.

Endorsed: No. 73. Oct. Term, 1904, In Circuit Court of U. S., Eastern District of Pennsylvania. Webster Coal & Coke Co. *vs.* Pennsylvania Railroad Company. Præcipe for Summons. Filed Jan. 24, 1905. Samuel Bell, Clerk.

4 UNITED STATES, *Eastern District of Pennsylvania, sct:*

The President of the United States to the Marshal of the Eastern District of Pennsylvania, Greeting:

We command you, that you summon Pennsylvania Railroad Company, late of your District, if it may be found therein, so that it be and appear before the Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in and for the Third Circuit, at a Session of the same Court to be holden at Philadelphia on the first Monday of February next, to answer to Webster Coal & Coke Company, in a plea of Assumpsit. And have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 24th day of January, A. D. 1905, and in the 129th year of the Independence of the United States.

(Signed) SAMUEL BELL,
[SEAL.] *Clerk of Circuit Court, U. S.*

Endorsed: No. 73. October Sessions, 1904. Circuit Court. Webster Coal & Coke Company *vs.* Pennsylvania Railroad Company. Summons Assumpsit. Filed Feb. 15, 1905. Samuel Bell, Clerk. Returnable on the first Monday of February next. Thos. H. Atherton, Attorney for plaintiff.

Return, Jany. 25, 1905, at Philadelphia in my district served the within writ on Pennsylvania Railroad Co. by giving a true and attested copy thereof to A. J. County, Assistant Secretary of said Company, making contents known. So answers, &c., Jno. B. Robinson, U. S. Marshal, per Jos. H. Huddell, Deputy.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 73.

WEBSTER COAL & COKE COMPANY, Plaintiff,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant.

5 *Plaintiff's Statement.*

The Webster Coal and Coke Company files this statement of its claim upon and demands against the Pennsylvania Railroad Company, and for causes of action alleges as follows:

First. That said Webster Coal and Coke Company is a corporation of the State of Pennsylvania and from October 1st, 1901, to September 1st, 1903, was the owner of large bodies of bituminous coal lands, situate in the counties of Cambria and Blair, State of Pennsylvania, and was engaged in the business of mining, producing

and shipping coal and coke thereon and therefrom, that on or about said date of September 1st, 1903, it sold and conveyed its said lands and improvements to the Pennsylvania Coal and Coke Company, also a corporation of the State of Pennsylvania.

Second. That the Pennsylvania Railroad Company is a corporation of the State of Pennsylvania, having its principal office in the City of Philadelphia in said State, and is a common carrier engaged in the transportation of passengers and property both wholly by railroad and partly by railroad and partly by water, under a common control, management or arrangement for a continuous carriage or shipment from within the State of Pennsylvania to other States of the United States and to foreign countries, and is subject to the provisions of the Act of Congress of February 4th, 1887, entitled "An Act to Regulate Commerce" and the various amendments thereto; that said defendant among its branches or divisions controls and operates what are known as the Tyrone Division, Pittsburgh Division, Cambria and Clearfield Division, Pennsylvania and Northwestern Division, Western Pennsylvania Division and Monongahela Division.

Third. That the said mines of the plaintiff and the mines of other shippers of bituminous coal, especially those of the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company, are situated along or near defendant's said divisions and its main line of railroad west of Altoona and east of Pittsburgh, and that all of the coal and coke produced and shipped from the lands of the plaintiff during the period from October 1st, 1901, until September 1st, 1903, was shipped over said main line and divisions of the defendant largely to points without the boundaries of the State of Pennsylvania, by continuous carriage or shipment, and under the control and management of defendant.

Fourth. That the defendant during all the aforesaid period arbitrarily assumed the right to estimate and determine the capacity to produce coal of the mines of the plaintiff and did in fact estimate and fix upon what it declared and published to be the capacity of the mines of the plaintiff as well as the capacity of the mines
6 of the Berwind White Coal Mining Company, the Keystone Coal and Coke Company and other shippers of coal along its said main line and divisions, upon the basis of which rating of capacity it furthermore assumed the right to determine and did in fact estimate and fix upon the percentage of cars which it claimed plaintiff was entitled to have and receive daily out of the total number of cars which were to be distributed by defendant upon and along its said main line and divisions for the transportation of coal.

Fifth. That the actual capacity of plaintiff's mines to produce coal was at all times much greater than that estimated and fixed upon by defendant, as aforesaid, and that by reason thereof, plaintiff was subjected to undue and unreasonable prejudice and disadvantage in respect to the estimate made by defendant as to the number of cars apportionable to plaintiff for the transportation of its coal, as will hereinafter be more fully set forth.

Sixth. That at all times during the aforesaid period, that is, from

October 1st, 1901, to September 1st, 1903, defendant's aforesaid lines of railroad formed the only outlet to market for plaintiff's coal, and that plaintiff constantly had orders for its coal largely in excess of the output per diem allotted and fixed upon by the defendant, and largely in excess of the carrying capacity of the cars distributed to plaintiff by the defendant, for that purpose; that during all of said period the plaintiff repeatedly demanded from the defendant cars for the transportation of the coal which it was able and ready to mine and ship from its said mines in excess of that actually shipped by it and for which it has a market without the State of Pennsylvania, and which would have entered into and formed a part of the interstate commerce of the country, but that defendant unlawfully, unjustly and unreasonably neglected and refused to furnish plaintiff with the number of cars which it was entitled to receive and which defendant had available for such purpose, and subjected plaintiff to undue and unreasonable prejudice and disadvantage by giving to other and favored shippers in the same region cars which would have gone to plaintiff had the same been distributed by defendant upon the basis of the productive capacity of its mines as compared with that of the mines of such other shippers, especially the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company, and furthermore by issuing orders directing that cars to the number of 500 or thereabouts daily should first be given to said Berwind-White Coal Mining Company before any distribution of cars was made to plaintiff, by actually transferring the title to or control of a large number of its cars to said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company, thus decreasing the supply of cars which said defendant had available for distributing to plaintiff for the shipment of its coal then
7 ready and offered for shipment; by preferring said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company and other shippers in the distribution of cars belonging to other railroad companies and temporarily on the lines or under the control of the defendant; by preferring said Berwind White Coal Mining Company and said Keystone Coal and Coke Company and other shippers in the distribution and allotment of cars intended for the fuel supply of defendant in that defendant excluded such cars from the rated allotment of said shippers; by hauling the cars belonging to said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company to market when loaded and returning the same as empties with much greater expedition than that with which the cars belonging to the plaintiff were moved; and by other wrongful acts.

Seventh. That the amount of coal which the defendant thus aforesaid wrongfully deprived plaintiff of the right to mine, ship and sell in the open market and the amount which plaintiff could and would have sold and shipped except for the discrimination and favoritism aforesaid was 1,208,599 tons.

Eighth. That in addition to the loss and damage occasioned to plaintiff by said defendant through its failure, as aforesaid, to furnish plaintiff with its proper quota of cars, said plaintiff suffered a

further loss by reason of the consequent curtailment of the output of its said mines, thereby increasing the cost of mining the coal actually mined and shipped by said plaintiff during the aforesaid period.

Ninth. That by reason of the aforesaid acts of unjust and unlawful discrimination practiced by the defendant in favor of other shippers and in violation of its duty as a common carrier the plaintiff has suffered damages to the amount of $1,392,695.

Second Cause of Action.

For a second and separate cause of action plaintiff repeats and renews each and every allegation contained in the paragraphs numbered First, Second and Third of this complaint with the same force and effect as though here again stated fully and at length, and further alleges:

Tenth. That among the collieries owned by the plaintiff during the aforesaid period from October 1st, 1901, to September 1st, 1903, was the so-called Gallitzin Colliery situated near the defendant's main line of railroad west of Altoona, and that in the same vicinity are collieries owned during said period by the Altoona Coal and Coke Company and the Glen White Coal and Coke Company; that said Gallitzin Coll-ery of the plaintiff and the collieries of said Altoona Coal and Coke Company and Glen White Coal and
8 Coke Company are connected with defendant's railroad by short lines of railroad owned and operated by the plaintiff and said other companies, respectively; that in the regular course of business it was the practice of defendant during all of said period to deliver empty cars at the junction of its railroad with said other railroads, and for the respective owners of said collieries to haul with their own motive power such empty cars to their respective collieries and haul them back loaded, and so loaded deliver them to the defendant; that the coal and coke so as aforesaid delivered to the defendant for transportation from all of said collieries was carried to the same general markets and that the defendant in the transportation of all of said coal and coke did for the plaintiff and for the said Altoona Coal and Coke Company and Glen White Coal and Coke Company like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Eleventh. That the defendant without the knowledge of the plaintiff allowed and paid to said Altoona Coal and Coke Company and Glen White Coal and Coke Company respectively during said period from October 1, 1901, to September 1, 1903, a special rebate or drawback of 15 cents per ton on all of the coal and coke which said companies respectively hauled from their said collieries and delivered to defendant; but allowed no rebate or drawback or any compensation whatsoever for the coal and coke hauled by the plaintiff from its said Gallitzin Colliery and delivered to defendant.

Twelfth. That during said period from October 1st, 1901, to September 1st, 1903, the plaintiff hauled from its said Gallitzin Col-

liery and delivered to the defendant for transportation to market upwards of 607,620 tons of coal and coke, and for the service rendered to the plaintiff in the transportation of the same, defendant, by such aforesaid rebate or drawback charged, demanded, collected and received from the plaintiff a greater compensation to the extent of 15 cents per ton of coal and coke than it charged, demanded, collected or received from said Altoona Coal and Coke Company and Glen White Coal and Coke Company, and that by reason of the premises plaintiff has been damaged in the sum of $91,143; that payment of said sum has been duly demanded, but that defendant has failed and refused to pay the same or any part thereof.

Wherefore, the plaintiff demands judgment against the defendant for the aggregate sum of $1,483,838, with interest.

WEBSTER COAL & COKE CO.,
By THOS. H. ATHERTON, *Attorney.*

Jany. 11th, 1905.

9 In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

Albert G. Edwards being duly sworn deposes and says that he is the Secretary of the Webster Coal & Coke Company, the Plaintiff in this case. That he is conversant with the facts and claims stated in the foregoing statement or declaration, and that he verily believes the amounts for which suit has been brought are justly due and owing from the defendant to the plaintiff.

ALBERT G. EDWARDS.

Sworn and subscribed before me this 11th day of January, 1905.

HARRY J. REBMAN,
[SEAL.] *Notary Public.*

Commission expires March 13th, 1905.

I hereby certify that I am not a Stockholder, Director or Clerk in the Corporation for which I hereby act as Notary Public.

Endorsed: No. 13. Oct. Term, 1904. In Circuit Court of United States, Eastern District of Pennsylvania. Webster Coal & Coke Co., *vs.* Pennsylvania Railroad Company. Declaration. Filed Jan. 24, 1905. Samuel Bell, Clerk. Thos. H. Atherton, Attorney at Law, Wilkesbarre, Pa.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

10 Personally appeared Jos. H. Huddell, who being duly affirmed, says that in the above case he on Jany. 25th, 1905, served the defendant with a copy of the Plaintiff's Statement of Claim by giving same to A. J. County, Asst. Secy. of said Company.

(Signed) JOS. H. HUDDELL.

Affirmed and subscribed before me this 26th day of Jany., 1906.

(Signed) T. L. COBAUGH,
[SEAL.] *Deputy Clerk District Court United States, Eastern District of Pennsylvania.*

Endorsed: No. 73, U. S. C. C. E. D. of Pa. Oct. 1904. Webster Coal & Coke Co., *vs.* Penna. R. R. Co. Proof of service. Filed Jan. 26, 1905. Samuel Bell, Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Enter my appearance for defendant in the above case.

JOHN G. JOHNSON,
Per G. C. WOODWARD,
Attorney for said Defendant.

February 9, 1905.

To Clerk of the U. S. C. C.

Endorsed: No. 73. October Term, 1904. U. S. C. C. Webster Coal & Coke Co. *vs.* Penna. Railroad Co. Order for Appearance. Filed Feb. 9, 1905. Samuel Bell, Clerk. John G. Johnson, Attorney for Defendant.

11 In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

PHILADELPHIA COUNTY, *ss:*

Lewis Neilson the duly sworn, says:—I am the secretary of corporation defendant in the above entitled cause and make this affidavit on its behalf.

The defendant has a good defence to the whole of plaintiff's claim. It has not been guilty of the wrongful actions alleged in plaintiff's statement of claim.

The defendant has been advised by counsel, and I therefore aver that although the form of the plaintiff's action in this case is in assumpsit, the defendant is not required to file any affidavit of defense therein, because the cause of action set out in plaintiff's statement is not a cause of action arising *ex contractu* in which alone an affidavit of defence can be required under the law and practice in this commonwealth, but is a cause of action arising *ex delicto* in which no affidavit of defence is required.

The defendant therefore denies the right of the plaintiff to require any affidavit of defence in the present case from the defendant.

(Signed) LEWIS NEILSON.

Sworn to and subscribed before me this 2nd day of February, 1905.

HIRAM H. POTTS,
[SEAL.] *Notary Public.*

My commission expires on 26th day of February, 1905.

Endorsed: No. 73. October Term, 1904. U. S. C. C. Webster Coal and Coke Company *vs.* Pennsylvania R. R. Co. Affidavit of Defence. Filed Feb. 9, 1905. Samuel Bell, Clerk. John G. Johnson.

12 In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

To Hon. Samuel Bell, Clerk, &c.:

Issue Rule directed to the defendant in the above entitled case to enter a plea within fifteen days in accordance with rule of Court No. 20.

THOS. H. ATHERTON,
Attorney,
Per D. L. KREBS, *Pro Plaintiff.*

Endorsed: 73 Oct. Sess., 1904. U. S. C. C. E. D. of Pa. Webster Coal & Coke Co. *vs.* Penna. R. R. Co. Rule to plead. Filed Feby. 21, 1905. Samuel Bell, Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Defendant in the above pleads "Not Guilty."

JOHN G. JOHNSON,
Per E. A. WATERS,
Attorney for said Defendant.

March 11, 1905.

To Clerk of U. S. C. C.

13 Endorsed: No. 73. Oct. Sessions, 1904. U. S. C. C. Eastern District of Penna. Webster Coal & Coke Co. *vs.* Penna. R. R. Co. Filed March 11, 1905. Samuel Bell, Clerk. Plea. John G. Johnson, Attorney for Defendant.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 73.

WEBSTER COAL & COKE COMPANY, Plaintiff,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant.

To the Pennsylvania Railroad Company, Defendant, John G. Johnson, Esq., Counsel:

You are respectfully herewith notified that on the pleadings herein and the annexed affidavit of Robert Mitchell, Agent and representative of the Plaintiff, verified the 6th day of April, 1906, and the annexed affidavit of David L. Krebs, Attorney of the Plaintiff, and verified the 6th day of April, 1906, an application and motion will be made to the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, on the 11th day of April, 1906, at 10 o'clock A. M. for an order on the Defendant Company, its officers, agents and employees, to produce before the trial of the action and at such time and place as to the Court may seem proper, the following books, documents and writings, to wit:

The Daily Distribution Sheets and records showing the rated output capacity of the several mines and collieries on the several Divisions of the Defendant Company's roads and branches, as enumerated and set forth in the subjoined petition, and particularly those showing the number of cars distributed daily to the said Berwind White Coal Mining Company and the Keystone Coal & Coke Company, as well as the Plaintiff's, as well as the percentage of cars which the said Plaintiff was entitled to receive under the rating and distribution sheets aforesaid, and which it would have been entitled to receive had it received its due proportion of the daily number of cars for daily distribution, and which were distributed each
14 and every day during the period of time between the first day of May, 1902, and the first day of January, 1904.

Also that said Defendant Company, its officers, agents and employees, produce before the trial of the action, the books, records and documents showing the transfer of coal cars of the Defendant Company to the Berwind White Coal Mining Company and the Keystone Coal & Coke Company, between the first day of October, 1901, and the first day of January, 1904, and also for the production of the special orders issued for the distribution of 500 coal cars daily to the Berwind White Coal Mining Company, and also all special orders for the distribution of cars to the said Berwind White Coal Mining Company and the Keystone Coal and Coke Company or any other shippers between the said first day of October, 1901, and the first day of January, 1904, and also to produce the order dated between the first day and the fifth day of February, 1905, directing the cancellation of all special orders issued at any time prior to that date, and to permit the Plaintiff, by its agents, and employees, to

copy and make abstracts of said books, documents and writings, and direct that the Defendant, upon failure to comply with said order shall suffer judgment by default herein, and for such other and further relief as to the Court may seem just and proper.

WEBSTER COAL & COKE CO.,
By Its Attorneys, JOHN W. GRIGGS,
BENJ. S. HARMON,
DAVID L. KREBS.

Philadelphia, April 6, 1906.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term, 1905.

No. 73.

WEBSTER COAL & COKE COMPANY, Plaintiff,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant.

15 To the Honorable the Judges of said Court:

The Petition of the Webster Coal & Coke Company, respectfully represents:

First. That it instituted an action against the Pennsylvania Railroad Company to No. 73 October Term, 1905, as above stated in which action it seeks to recover damages from the Defendant Company therein named upon the following, among other causes of action set forth in its statement as appears on file in your said Honorable Court, to wit:

"Sixth. That at all times during the aforesaid period, that is, from October 1st, 1901, to Sept. 1st, 1903, defendant's aforesaid lines of railroad formed the only outlet to market for plaintiff's coal, and that plaintiff constantly had orders for its coal largely in excess of the output per diem allotted and fixed upon by the defendant, and largely in excess of the carrying capacity of the cars distributed to plaintiff by the defendant for that purpose, that during all of said period the plaintiff repeatedly demanded from the defendant cars for transportation of the coal which it was able and ready to mine and ship from its said mines in excess of that actually shipped by it and for which it had a market without the State of Pennsylvania and which would have entered into and formed a part of the Inter-State Commerce of the country, but that defendant unlawfully, unjustly and unreasonably neglected to furnish plaintiff with the number of cars which it was entitled to receive and which defendant had available for such purposes, and subjected plaintiff to undue and unreasonable prejudice and disadvantage by giving to other and favored shippers in the same region which would have gone to plaintiff had the same been distributed by defendant upon the basis of the productive capacity of its mines as compared with that of the mines of such other shippers, especially the Berwind-

White Coal Mining Company and the Keystone Coal and Coke Company, and furthermore by issuing orders directing that cars to the number of five hundred or thereabouts, daily should first be given to said Berwind-White Coal Mining Company before any distribution of cars was made to plaintiff, by actually transferring the title to or control of a large number of its cars to said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company, thus decreasing the supply of cars which said defendant had available for distribution to plaintiff for the shipment of its coal then ready and offered for shipment; by preferring the said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company and other shippers in the distribution of cars belonging to other railroad companies and temporarily on the lines or under the control of the defendant; by preferring the said Berwind-White Coal Mining Company and said Keystone Coal
16 and Coke Company and other shippers in the distribution and allotment of cars intended for the fuel supply of defendant in that defendant excluded such cars from the rated allotment of said shippers; by hauling the cars belonging to said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company to market when loaded and returning the same as empties with much greater expedition than that with which the cars belonging to the plaintiff were moved; and by other wrongful acts.

Wherefore your Petitioner further represents to your Honorable Court that the Pennsylvania Railroad Company, defendant, made a daily record, partly in print and partly in writing which record was and is commonly known as "the Daily Distribution Sheets" which distribution sheets contained the following matter, that is to say, said daily distribution sheets set forth the daily output capacity of each and every mine producing and shipping Bituminous coal from the region known as the Mountain division, the Cambria & Clearfield division, the South Fork division, Tyrone & Clearfield division, and the Pennsylvania and Northwestern division; and said daily distribution sheets do also set forth and contain the percentage of cars for transporting coal and coke which each and every mine was entitled to receive daily out of the whole number of cars for distribution each day. That a sheet containing the record of the rated output capacity of each of plaintiff's mines, as well as the rated output capacity of the mines of the Berwind-White Coal Mining Company and the Keystone Coal & Coke Company, as well as each and every other mine operation, mining or shipping coal over the Defendant's railroad, from the divisions aforesaid, is and was made and that in addition to said rated output capacity, said sheets made each and every day contain a statement of the whole number of cars distributed each and every day to each of said divisions as also to each and every one of the mines in each and every one of said divisions as well as a statement showing the number of cars for transporting coal and coke distributed each and every day to the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company and other favored shippers; and doth in like manner set forth and contain a statement showing the percentage of cars to which each

and every one of said mines and operations were entitled to, as well as the mines and operations of the said Berwind-White Coal Mining Company and the Keystone Coal and Coke Company and other shippers, and said daily distribution sheets do also set out and contain the actual number of cars distributed to each and every mine mining and shipping coal from each and every of said several above named divisions of the defendant's railroad and particularly the whole number of cars distributed each and every day unto the said Berwind-White Coal Mining Company and Keystone
17 Coal and Coke Company and other favored shippers as well as the actual number of cars distributed each and every day to the Plaintiff herein named.

That said daily distribution sheets are in the custody and under the exclusive control of the defendant's Company.

That the matter contained therein is pertinent and material to the issue joined in the trial of the above recited case to Number 73 October Term, 1905. That the period of time covered by the said daily distribution sheets is from the first day of October, 1901, to the first day of September, 1903, and that inasmuch as there is a separate sheet showing the distribution for each and every working day as well as each and every Sunday on which coal was transported by the defendant's Company and as an examination of said daily distribution sheets is necessary and must be made in order to ascertain not only the rated output capacity of the plaintiff's several mines and operations, mining, shipping and transporting coal over defendant's road from the several divisions, and particularly from the Mountain division of the Pennsylvania Railroad, as well as to prove the whole number of cars for daily distribution on the said several divisions, and particularly the Mountain division and also South Fork division, and to prove the percentage to which each and every of the said operating mines having coal transported by the defendant's Company from the said several divisions, was entitled to have and also to prove the number of cars allotted daily to each of the said operations and particularly the operations of the Berwind-White Coal Mining Company and the Keystone Coal & Coke Company, and to the plaintiff, and said testimony being material and pertinent to the issue trying the necessary cause, and being under the exclusive control of the defendant, and the plaintiff having no access thereto, the plaintiff respectfully prays the court that an order be now made directing the defendant Company to permit the plaintiff, by its agent, representative and accountants, to have access to said daily distribution sheets in order that tables and computations may be made therefrom of the material and things heretofore mentioned and set forth and particularly to enable them to show the whole number of cars distributed daily, the percentage to which the plaintiff was entitled and the number of cars actually received by the plaintiff and number of cars actually distributed to and received by the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company as well as the several other operators and shippers along said line. That by the preparation of such a tabulated statement prior to the calling of the above cause for trial, much

time and labor would be saved, and the trial of the cause much expedited and hastened without injuring in the least the defendant Company. That without the production of said records and daily distribution sheets, the trial of said cause will necessarily be prolonged and delayed.

18 And the petitioner further prays the Court to make such further order as shall require the Defendant Company, its officers, agents, servants and employees to produce the books and records of the Defendant, which contain a record of the transfer of coal cars of the Defendant Company to the Berwind-White Coal Mining Company or the Keystone Coal & Coke Company between the first day of October, 1901, and the first day of January, 1904, and that the said defendant Company shall also produce all books, records and papers containing special orders issued by its officers, agents, servants or employees for the distribution of 500 cars daily to the said Berwind-White Coal Mining Company, and also the books, records and papers containing all special orders for the distribution of cars to the said Berwind-White Coal Mining Company, the Keystone Coal & Coke Company or any other shippers of coal, and also to require the said defendant Company, its officers, agents, servants and employees to produce the records containing any and all orders, directions and instructions issued to George W. Creighton, R. M. Patterson, David Steel, J. M. Wallis, George W. Clark, or to any other person or persons whatsoever, ordering and directing the allotment of cars to the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, D. E. Williams & Company or any other shipper of coal and coke over defendant's lines and particularly any and all orders issued by defendant for the distribution of coal cars to said Companies or either of them or other shippers, between the first day of October, 1901, and the fifth day of February, 1905, and to produce also the order issued between the first day and the sixth day of February, 1905, revoking all special orders previously issued and then in force for the distribution of cars to said shippers, or either of them, or any other shippers.

WEBSTER COAL & COKE CO.,
By Its Attorneys, JOHN W. GRIGGS,
BENJ. S. HARMON,
DAVID L. KREBS,
GEO. S. GRAHAM.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Before me, a Notary Public, in and for said City, personally came Robert Mitchell, who being duly sworn saith that he is the representative and agent of the Pennsylvania Coal & Coke Company, that he has read the above and foregoing petition and that the facts set forth therein are true and correct. That said daily dis-

19 tribution sheets are in the possession of the defendant Company. That they contain the matter in said petition set forth and that the facts contained in said daily distribution sheets

are material and pertinent and necessary to the trial of the plaintiff's cause and that without such production and examination of said paper and tabulated statement of same, the trial of such cause will be greatly hindered and delayed.

(Signed) ROBERT MITCHELL.

Sworn and subscribed before me this 6th day of April, A. D. 1906.

E. CAMILE KLONOWER,
Notary Public.

[SEAL.]

Commission expires Jan. 16, 1909.

I acknowledge the above notice has been served upon me but I do not waive any objection to the Court of sufficient notice of the application or any other right.

(Signed) JOHN G. JOHNSON,
Attorney P. R. R. Co.

April 6, 1906.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

David L. Krebs, being duly affirmed, says that he is one of the Attorneys for the Plaintiff in the hereinbefore stated cause, and is familiar with the proceedings herein. That the above entitled action is an action of Law, being an action for damages on account of unjust discrimination, as will appear from the pleadings herein. That the action was duly instituted by service of summons and complaint. That the Defendant's answer was filed and that the cause is now at issue and set for trial on the 23rd day of April, 1906. That the books and documents referred to in the annexed petition and Affidavit of Robert Mitchell, Agent and representative of the Plaintiff, contain evidence pertinent and material to the issue to be tried in such cause.

(Signed) DAVID L. KREBS.

Affirmed and subscribed to before me this 6th day of April, 1906.

E. CAMILE KLONOWER,
Notary Public.

Commission expires Jan. 16, 1909.

Endorsed: No. 73. Oct. Sess., 1904. U. S. C. C. E. D. of Pa. Webster Coal & Coke Co., *vs.* Penna. R. R. Co. Petition for an order on Deft. to produce certain books, &c. Filed April 11, 1906. Samuel Bell, Clerk.

20 In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1905.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur application and motion for an order on the defendant company, its officers, agents and employees, to produce books, documents and papers prior to the trial of the case and submit the same to the inspection of the plaintiff, its counsel and employees, and permit the same to make copies and abstracts of said books, documents and papers.

Answer of the Pennsylvania Railroad Co.

The Pennsylvania Railroad Company, the Defendant in the above action, for answer to the said Application and Motion, says:

It suggests and submits to the Court that the Plaintiff is not entitled to require it to produce said books, documents and papers, because it is advised by counsel and therefore avers:

(*a*) That the pending action, in which said Application and Motion is made, is of such a character, being brought to recover damages in the nature of penalties, that this Defendant is not obliged to produce its books and papers relating to the transactions covered by the action, either for inspection before the trial or at the trial itself.

(*b*) That even were this an action in which the Defendant could be required to produce at the trial the books and papers relating to the transactions in question, the Plaintiff is not entitled to require it to produce the same before the trial and in the manner and for the purpose sought.

Subject to and without waiving the objections above stated to the granting of the order sought by the Plaintiff, this Defendant further states and shows to the Court that it is unable at the present time to answer as to its ability to produce the distribution sheets referred to in the Plaintiff's petition for the entire period of time referred to therein. It has in its possession a large number of such sheets, but until a more thorough examination is made than it has been able to make as yet in order to determine what sheets it has, it cannot answer definitely as to this.

21 It has also in its possession a large number of special orders relating to the allotment of cars issued during the period referred to in the Petition; and while it can, therefore, produce such as it has in its possession, if it should be determined that the Plaintiff is entitled to an inspection of these, it submits to the Court that the mere production of these orders would not tend to establish anything in reference to the allotment of cars which was actually made

at any one time or on any one day. The actual allotment made can be shown only from the distribution sheets already referred to.

The Defendant further submits that if any order is made for the production of any papers, it should be confined to such only as related to or affected the allotment of cars made within the period covered by the action.

THE PENNSYLVANIA RAILROAD COMPANY,
By JOHN P. GREEN, *Vice President.*

April 11th, 1906.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Lewis Neilson, being duly sworn according to Law, deposes and says that he is Secretary of the Pennsylvania Railroad Company, the Defendant in the foregoing action; that the above answer is true and correct to the best of his knowledge and belief.

(Signed) LEWIS NEILSON.

Sworn and subscribed to before me this 11th day of April, 1906.

(Signed) C. M. GREER,
[SEAL.] *Notary Public.*

Commission expires January 19th, 1907.

Endorsed: Cir. Court, U. S., Eastern District of Penna. No. 73. October Sessions, 1905. Webster Coal & Coke Co. *vs.* Pennsylvania Railroad Company. *Sur* application and motion for an order on Defendant Company &c., to produce books, documents, papers, &c. Answer of Pennsylvania Railroad Co. Filed Apr. 11, 1906. Samuel Bell, Clerk.

22 In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term, 1904.

No. 73.

WEBSTER COAL & COKE COMPANY, Plaintiff,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant.

Before Holland, J.

And now, this 12th day of April, 1906, the petition of the plaintiff and the accompanying motion for an order, on the officers, agents and employees of the defendant, to produce certain books, records and papers, specified and mentioned in the petition, and to permit the plaintiff to have access thereto, prior to the time set for the trial of the above stated cause, having been presented, argued

and by us considered; it is adjudged, ordered and decreed that Alexander J. Cassatt, President, John B. Thayer, Fourth Vice President, Head of the Traffic Department, Charles E. Pugh, Second Vice President, Head of Transportation Department, W. W. Atterbury, General Manager, Michael Trump, General Superintendent of Transportation, R. M. Patterson, Superintendent of Freight Transportation, J. G. Searles, Coal Freight Agent, George W. Creighton, General Superintendent, William W. Strong, Oscar A. Knipe, William J. Bingham, A. S. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, R. L. Head, Agents and employees of the Pennsylvania Railroad Company, Defendant, shall produce and submit to the examination by the Plaintiff, its agents, accountants and attorneys, the "Daily Distribution Sheets," made and kept by the Defendant, between the 1st day of October, A. D. 1901, and the 1st day of September, A. D. 1903, both days included, so that the plaintiff may therefrom prepare tabulated statements showing the rated output capacity of the mines of the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, and of the Webster Coal and Coke Company.

Also of the percentage of cars to which the said Berwind-White Coal Mining Company and Keystone Coal and Coke Company, and the plaintiff, the Webster Coal and Coke Company each were entitled to receive, as fixed by the Defendant Company, and contained and set forth on said Daily Distribution Sheets, the whole number of cars daily allotted to the Mountain Division, the Cambria and Clearfield Division, the South Fork and Scalp Level Branch or
23 Division, the Pennsylvania & Northwestern Division, and the Tyrone & Clearfield Division of the Pennsylvania Railroad Company, and the whole number allotted daily to the said Berwind-White Coal Mining Company, the Keystone Coal & Coke Company and the said plaintiff, the Webster Coal & Coke Company over and from said several divisions. And it is further ordered and decreed that the aforesaid officers, agents and employees of the Pennsylvania Railroad Company, shall produce and submit to the inspection of and to make copies of all special orders issued at any time between the 1st day of October, A. D. 1901, and the 1st day of September, A. D. 1903, or which were in force and effect between said dates, although made prior to said 1st day of October, 1901, ordering and directing the distribution of coal cars to the said Berwind-White Coal Mining Company, the Keystone Coal and Coke Company, or any other miners and shippers of coal from any of said several divisions or branches of Defendant's Railroad, especially the order giving, granting and distributing to the Berwind-White Coal Mining Company, five hundred coal cars each day.

The production of said Daily Distribution Sheets and other papers, and the said inspection and examination and preparation of said statements and copies to be made at the office or rooms of the Defendant Company, at Broad Street Station, Philadelphia, Pa., to begin on the 16th day of April, A. D. 1906, and to continue from

day to day until fully completed. The Defendant may be represented by its agent or agents or attorney as it may desire.

BY THE COURT.

Attest:

GEORGE BRODBECK, JR., *Pro Clerk.*

Endorsed: U. S. C. C. E. D. of Pa. 73. Oct. Sess., 1904. Webster Coal & Coke Co., *vs.* Penna. R. R. Co. Order directing Deft. to produce certain papers, &c. Filed Apr. 12, 1906. Samuel Bell, Clerk.

24 In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term, 1905.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head, named in the order entered by this Court on April 12, 1906, hereby except to the same.

(Signed) JOHN G. JOHNSON,
Attorney for Exceptants.

April 14, 1906.

Endorsed: No. 73. Oct. Sess., 1904. U. S. C. E. E. D. of Pa. Webster Coal & Coke Co. *vs.* The Pennsylvania Railroad Co. Exceptions to order to produce books, etc. Filed Apr. 14, 1906. Samuel Bell, Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term, 1905.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur Writ of Error of Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson,
25 and R. L. Head, to Order and Decree entered April 12, 1906, requiring the production by them of books, records and papers prior to and at the trial of said cause.

Assignments of Error.

1. The Circuit Court erred in entering the order and decree of April 12, 1906, requiring the plaintiffs in error to submit to the inspection of the plaintiff, and its counsel, prior to the trial of the said cause, the books, records and papers referred to in said order.

2. The Circuit Court erred in entering the Order and decree of April 12, 1906, requiring the plaintiffs in error to produce at the trial of the cause the books, records and papers referred to in the said order.

(Signed) JOHN G. JOHNSON,
Attorney for Plaintiffs in Error,
G. S. P.

Endorsed: No. 73. Oct. Sess., 1904. U. S. C. C. E. D. of Pa. Webster Coal & Coke Co., *vs.* Pennsylvania Railroad Company. Assignments of Error. Filed Apr. 14, 1906. Samuel Bell, Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term, 1905.

No. 73.

WEBSTER COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Petition for Writ of Error.

And now, April 14th, 1906, come Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, R. L. Head, by their Attorney, John G. Johnson, and say:

That on the 12th day of April, 1906, this Court entered
26 an order herein upon application of the Plaintiff and against your petitioners, in and by which order and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of your petitioners, all of which more in detail appear from the assignments of errors with this petition.

Wherefore your petitioners pray that a Writ of Error may issue in their behalf to the United States Circuit Court of Appeals for the Third Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in the cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

(Signed) JOHN G. JOHNSON,
Attorney for Petitioners,
G. P.

Allowed—
BY THE COURT.
Attest:
(Signed) GEORGE BRODBECK, JR., *Pro Clerk.*

Endorsed: No. 73. Oct. Sess., 1904. U. S. C. C. E. D. of Pa. Webster Coal & Coke Co., *vs.* Pennsylvania R. R. Co. Petition for writ of error and allowance. Filed Apr. 14, 1906. Samuel Bell, Clerk.

Know all men by these presents, that we, Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson and R. L. Head as principals, and the American Surety Company of New York as surety, are held and firmly bound unto Webster Coal & Coke Company, in the full and just sum of five hundred dollars, to be paid to the said Webster Coal & Coke Company, its certain attorney, successors, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of April, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a session of the Circuit Court of the United States for the Eastern District of Pennsylvania, in a suit depending in said Court, between Webster Coal & Coke Company, Plaintiff, and the Pennsylvania Railroad Company, Defendant, an order
27 was entered against the said Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson and R. L. Head on April 12th, 1906, and the said Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson and R. L. Head having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the order in the aforesaid suit, and a citation directed to the said Webster Coal & Coke Company citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia, within thirty days.

Now the condition of the above obligation is such, that if the said Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head, shall prosecute such writ to effect, and answer all damages and costs if they fail to make

their plea good then the above obligation to be void; else to remain in full force and virtue.

Signatures of principals waived.

Sealed and delivered in the presence of

[SEAL.] AMERICAN SURETY CO. OF NEW YORK,
By R. R. BENEDICT,
Resident Vice President.

Attest:
EDW. P. BAILEY,
Resident Assistant Secretary.

Approved—
BY THE COURT.

Attest:
(Signed) GEORGE BRODBECK, JR., *Pro Clerk.*

Endorsed: No. 73. Oct. Sess., 1904. U. S. C. C. E. D. of Pa. Webster Coal & Coke Co., *vs.* Penna. R. R. Co. Bond *sur* Writ of Error Filed Apr. 14, 1906. Samuel Bell, Clerk.

28 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Samuel Bell, Clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Pleas and Proceedings in the case of Webster Coal & Coke Company *vs.* Pennsylvania Railroad Company, No. 73, October Session, 1904, on file and now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 8th day of May, in the year of our Lord one thousand nine hundred and six and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

29 And afterwards, to wit, on the fourth day of October A. D. 1906, this cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Eastern District of Pennsylvania, before Hon. George Gray, and Hon. Joseph Buffington, Circuit Judges, and Hon. William M. Lanning, District Judge, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for the consideration thereof.

And afterwards, to wit, on the second day of January A. D. 1907, comes the parties aforesaid by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinions, to wit:

In the United States Circuit Court of Appeals for the Third Circuit.

ALEXANDER J. CASSATT and Others, Plaintiffs in Error,
vs.
WEBSTER COAL & COKE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. John G. Johnson, for Plaintiffs in Error.
Mr. Joseph Gilfillan and Mr. George S. Graham, for Defendant in error.

Per Curiam: The record of this case is similar to that in Alexander J. Cassatt *et al.*, plaintiffs in error, *vs.* Mitchell Coal and Coke Company, defendant in error, decided at this term. The same questions of law are presented. The opinion in that case controls the decision of this. The motion to dismiss the writ of error is denied and the judgment of the Circuit Court is reversed with costs.

In the United States Circuit Court of Appeals for the Third Circuit.

ALEXANDER J. CASSATT ET. AL., Plaintiffs in Error,
vs.
MITCHELL COAL AND COKE COMPANY, Defendant in Error.

30 In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. John G. Johnson, for plaintiffs in error.
Mr. Joseph Gilfillan and Mr. George S. Graham, for defendant in error.

Before Gray and Buffington, Circuit Judges, and Lanning, District Judge.

LANNING, *District Judge:*

The record of this case shows that the Mitchell Coal & Coke Company, plaintiff, has commenced an action at law in the Circuit Court of the United States for the Eastern District of Pennsylvania, against the Pennsylvania Railroad Company, defendant, to recover damages against the defendant for its alleged violation of sections 2 and 3 of the Interstate Commerce Act, approved February 4, 1887, by discriminating against the plaintiff in the allowance of freight rates on coal and coke. The defendant filed a plea that it was not guilty.

After issue was thus joined, and before the time for the trial of the action, the plaintiff filed in the Circuit Court a petition in which, after setting forth the nature of the action at law, and declaring that the defendant, and Alexander J. Cassatt, president, John S. Thayer, fourth Vice-President, and ten other specifically named officers and employees of the defendant, had in their possession or power certain

books and papers containing evidence pertinent to the issue, there was a prayer for an order requiring the defendant, and its said officers and employees, to produce said books and papers at the trial, and also for inspection by the plaintiff's representatives before trial. The application for the order was based on section 724 of the Revised Statutes, which is as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue. In cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If the plaintiff fails to comply with such order the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order the court may, on motion, give judgment against him by default."

On presentation of the petition to the Circuit Court, a rule was allowed requiring the defendant and its officers and employees named in the petition, to show cause before the court on a certain day why they "should not produce on the trial of this cause" the books and writings above referred to; and also why they should not produce them at a certain time and place before trial "and permit the
31 plaintiff, its counsel and accountants to inspect the same and take such copies as they may deem proper." The defendant answered the petition setting forth (1) that the action was for the recovery of damages in the nature of penalties, and therefore that the defendant was not obliged to produce its books and papers, either before or at the trial; (2) that even if the action were one in which the defendant could be required to produce its books and papers at the trial, it could not be required to do so before the trial; (3) that the petition did not describe with sufficient particularity the books and papers the production of which was desired, or state the facts which the books and papers would tend to prove; and (4) that the defendant could not produce any books which would show the rebates and drawbacks alleged to have been allowed to other companies, because they had not been so kept as to show any such allowances. With the petition and answer before it, the Circuit Court, on the return of the rule to show cause, "adjudged ordered and decreed" that Alexander J. Cassatt, President, John B. Thayer, fourth Vice-president, and the ten other officers and employees of the defendant, "produce on the trial of this cause" the books and papers described in the petition, and also that they produce them before trial at a specified time and place for the inspection of the plaintiff with leave to the plaintiff to make copies thereof.

This order is now brought before us for review on a writ of error sued out by Alexander J. Cassatt, John B. Thayer, and the ten other officers and employees of the defendant company.

At the threshold of the case we are confronted with the question, Have we power to review the order on this writ? The defendant in error, the Mitchell Coal & Coke Company, contends that we have not, and moves for the dismissal of the writ on the ground that the

order is not a "final decision" within the meaning of Section 6 of the Judiciary Act of March 3, 1891. The expression "final decision" used in that section is equivalent to "final decree" or "final judgment" used in the statutes preceding the enactment of the Judiciary Act of 1891. Brush Electric Company *vs.* Electric Improvement Company, 51 Fed. 560. It is conceded that the writ must be dismissed if the order brought up by it is an interlocutory, and not a final, judgment. What constitutes a final judgment or final decree has often been the subject of discussion by our Federal courts. For the present purpose it will be sufficient to refer to some of the cases in which it has been held that the judgments or decrees under review in appellate tribunals were final.

In Forgay, *et al., vs.* Conrad, 47 U. S., 201, there was a motion to dismiss an appeal from a decree in equity. The bill of complaint had been filed by an assignee in bankruptcy to secure a decree setting aside as fraudulent, deeds made by the bankrupt for his lands and slaves.

A decree was ultimately secured setting aside certain of the
32 deeds made to certain of the defendants in the suit, and providing "that the complainant do have execution for the several matters aforesaid in conformity with the law and the practice prescribed by the rules of the Supreme Court of the United States." The decree also contained a clause directing a master to take an account of the profits of the lands and slaves ordered to be delivered up, and provided that "so much of the said bill as contains or relates to matters hereby referred to the master for a report, is retained for further decree in the premises." Two of the defendants in the suit to whom deeds of conveyance had been executed, whose deeds were set aside as fraudulent, appealed from this decree. The other defendants did not appeal. It was urged before the Supreme Court that the decree was not final. Chief Justice Taney said:

"Undoubtedly it is not final in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decree' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." Further on in the opinion he said: "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed." It was accordingly held that the decree was a final one from which an appeal would lie.

Hinckley *vs.* Gilman, &c. Railroad Co., 94 U. S., 467, was a foreclosure suit. On April 8, 1876, a final decree was rendered in that suit. Hinckley having previously been appointed receiver therein. The mortgaged property was sold under the decree and thereafter, on the settlement of the receiver's accounts, he was found to be in-

debted in the sum of over $18,000 for which a decree was entered against him directing him to pay the sum so found against him into court by a certain day. From this decree he appealed. It was contended that he was not a party to the foreclosure suit, had no personal interest therein, and therefore could not prosecute an appeal. But Mr. Chief Justice Waite said:

"The receiver cannot, and does not, attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. To that
33 extent he has been subjected to the jurisdiction of the court and made liable to its orders and decrees. He has, therefore, the corresponding right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, although an officer of the court, and, after the final decree below, has the right to his appeal here. In this case the final decree has been given, and the case is properly here upon the appeal as prayed and allowed."

In Trustee *vs.* Greenough, 106 U. S., 527, the complainant, a holder of bonds of The Florida Railroad Company, filed a bill in equity on behalf of himself and the other bondholders against certain parties who, it was alleged, were illegally dissipating the property of the company. The complainant secured the relief he sought by a decree which took the management of the property out of the hands of the defendant trustees and put it into the hands of the agents appointed by the court. A great amount of property was thereby saved to the complainant and his co-bondholders. After this result had been secured, he filed a petition praying for the payment to him out of the funds of a sum sufficient to cover his expenses and for his personal services. The court made an order on this petition, allowing to the petitioner his expenses and a sum for personal services. From this order an appeal was taken. The objection was interposed that the order was not a final decree from which an appeal would lie. But Mr. Justice Bradley held that it was, saying:

"Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but under all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal."

In Brush Electric Co. *vs.* Electric Improvement Co., 51 Fed., 557, the California Electric Light Company and the San Jose Light and Power Company commenced a suit in equity against the Electric Improvement Company, for an infringement of a certain patent and joined with them as a plaintiff the Brush Electric Company without that company's consent. After the bill of complaint had been filed in the Circuit Court the Brush Electric Company moved for a dismissal of the suit as to it. A hearing was had on affidavits introduced by the Brush Electric Company and the California Electric

Light Company, bearing on the question of the right of the latter company to use the name of the Brush Electric Company in the suit.

The question of fact was considered and determined upon the
34 affidavits. Questions of law were also presented and decided.

The court by its order overruled the motion to dismiss. From this order the Brush Electric Company took an appeal to the Circuit Court of Appeals for the Ninth Circuit. That court held that the order should be deemed a final one from which an appeal would lie, saying that the matter presented for consideration was not one presented by the bill of complaint or sought to be determined by it. In speaking of final decisions, which determine all the questions raised on the face of the pleadings, it was said:

"Considering the construction given by the Supreme Court to the terms 'final decisions,' 'judgments,' or 'decrees,' we reach the conclusion that the term 'final decisions' in said statute (the Judiciary Act of 1891) under consideration, does not mean necessarily such decisions or decrees only which finally determine all the issues presented by the pleadings; that, while these are undoubtedly final decisions, the terms are not limited to them, but also apply to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles the controversy. * * * The order overruling the motion of the Brush Electric Company to dismiss the cause as to it, does seem to have been the final determination of a most important question, collateral in its character. In considering the motion, questions of fact and of law were involved. Distinct issues of both were presented. They were such as were not presented by the general issues in the case. These questions would not be again presented. They were not preliminary to the decree upon the merits, or involved in the decree upon the merits. The order determining the issues upon this motion we therefore hold was a 'final decision,' within the meaning of the statute concerning appeals in this court above referred to, and was therefore the subject of an appeal thereunder."

In McGourkey *vs.* Toledo & Ohio Railway, 146 U. S., 536, there is a review by Mr. Justice Brown of the preceding cases on the subject of what constitutes a final decree. This case, and the other cases above referred to, certainly make it clear that a decision in any particular proceeding which disposes of the whole matter litigated in that proceeding, and leaves nothing thereafter to be done except the ministerial act of executing it, is a final decree or final judgment in that proceeding, and one which may be reviewer on appeal or by writ of error.

In the case at bar, the order of the Circuit Court was to produce the books before the trial of the action at law as well as at trial. It

was made pursuant to the petition of the plaintiff in the prin-
35 cipal suit, who averred that the books contained evidence

pertinent to the issue. The answer to the petition presented issue upon several questions of law. The proceeding thus instituted and carried on was one collateral to the principal suit, though in aid of it. There is but one defendant in the principal suit, and that is the Pennsylvania Railroad Company. In the collateral proceed-

ing the defendants are the Pennsylvania Railroad Company and twelve other parties. It is those twelve other parties who have sued out the writ of error. The order of the Circuit Court is, in effect, one overruling the answer, which is an answer in the nature of a demurrer to the petition, and directing the defendants mentioned in the petition, other than the Pennsylvania Railroad Company, which company is not included in the order, to produce the books and papers not only on the trial of the action at law, but before the trial for the inspection of the counsel and agents of the plaintiff company.

We think this case is plainly distinguishable from Alexander *vs.* United States, 201 U. S., 117, in which the order appealed from was held to be an interlocutory order. There Alexander was directed by the court to appear before an examiner, in an equity suit, and produce certain books and answer the questions propounded to him by the complainant's counsel. He was a mere witness in the trial of the suit before the examiner. He was required, under Equity Rule 67, to answer all questions propounded to him. It was the duty of the examiner under that rule to take all the evidence, noting the objections thereto. Blease *vs.* Garlington, 92 U. S., 1.; Nelson *vs.* United States, 201 U. S., 92, 114. In every such case the customary rule is applicable that there is nothing from which a witness can appeal before he has been adjudged guilty of contempt. But in the case at bar the petitioner does not seek to secure evidence from a witness in the trial of the action at law, but to compel a discovery by the defendants in the collateral proceeding before the trial of the action at law. The procedure authorized by Section 724 is wholly statutory. It prescribes the penalty, and the only penalty, for non-production, which is judgment in the action at law against the defaulting party. No judgment of contempt can be rendered in such a case. Merchants' National Bank *vs.* State National Bank, Fed. Cas., No. 9,448, and 3 Cliff., 201.

We also think that the case of Logan *vs.* Pennsylvania Railroad Company, 132 Pa. St., 403, is distinguishable from the one now in hand. In that case an order was made requiring a party to an action at law to produce papers at the trial. The procedure was under the provisions of an act of the Legislature of Pennsylvania, approved February 27, 1798, which was evidently modeled upon section 15 of the Federal Judiciary Act of 1789 (now section 724 of the Revised Statutes). The order was made previous to the time fixed for trial and an appeal was taken from it. The Supreme
36 Court held that the order was merely interlocutory and therefore not one from which an appeal would lie. Inasmuch as the order in that case was to produce papers at the trial of the action, and not before the trial, it seems clear that the appellant should have reserved his objections to the order until the time of trial. The rulings of the court then made would have been subject to exceptions and could have been reviewed on a writ of error bringing up the final judgment. The case is not an authority for dismissing the writ of error now before us.

Our conclusion on the motion to dismiss the writ of error is that, as the plaintiffs in error have been subjected to the jurisdiction of

the Circuit Court, and made liable to its order in a proceeding collateral to and independent of the action at law, and as the order is a decision of all the matters involved in that proceeding and leaves nothing to be done except the ministerial act of executing it by producing the books of the defendant company, both before and at the trial of the action, it is, in so far as it requires production before the time of trial, a "final decision" reviewable on a writ of error.

We turn, then, to the consideration of the questions presented by the assignment of errors. The first of these questions is, Are the plaintiffs in error "parties" within the meaning of Section 724? In an action at law, if a corporation be a party, a discovery in aid of the action may be obtained by filing in chancery a bill against the corporation and its officers. The officers may be joined in the equity suit because the corporation can answer only under its seal, while the officers are required to answer under oath. In the present case the petitioner has sought to invoke that practice. The argument on behalf of the petitioners is that the officers of the corporation are required to produce its books not as individuals but as representatives of the corporation. But Section 724 does not authorize such practice. The language is that the Federal courts may require "the parties," that is, the parties to an action at law, to produce books or writings at the trial of the action. In Rose *vs.* King, 5 S. & R., 241, the Supreme Court of Pennsylvania, dealing with an order made under the Pennsylvania statute above referred to, declared that there was no power under that statute to require a third person, not a party to the record of the case, to produce books or papers at the trial of the action. In construing Section 724 of the Federal Statutes, the same rule was followed in Ridgley *vs.* Richard, 130 Fed., 387. As the plaintiffs in error in the present case are not parties to the action at law, their failure to obey the order directed to them could furnish no warrant for awarding judgment by default against the defendant in that action. The order is therefore void, and for this reason must be reversed.

This point, however, relates merely to a technical defect in the procedure that may be corrected by an application to the
37 Circuit Court for a new order directed to the defendant company, and not to its officers. If a new order be applied for, and the defendant be required to produce its books for the inspection of the plaintiff's agents before the trial of the action, another writ of error may be taken to bring up that order and thus the trial of the action may be greatly delayed. We have therefore considered the second question, fully argued by counsel, which is, Has the Circuit Court the power, under Section 724, to order a party to produce its books or papers before the time of trial? The decisions of the Circuit Court are divided on the question, the larger number doubtless being in favor of the exercise of the power. The section is substantially in the same form as when it was first enacted as section 15 of the Judiciary Act of 1789. In 1789, the parties to an action at law were not admissible as witnesses and did not become so in our Federal Courts until 1864, when Section 858 of the Revised Statutes was first enacted. By the old practice, a party in an action at law might

give notice to his adversary to produce at the trial any document containing evidence pertinent to the issue, shown to be in his adversary's possession, and, if it were not produced, might give, if he were able to do so, secondary evidence of its contents. There was no difference in this respect between civil and original actions. Attorney General *vs.* Le Merchant, decided in 1779, and King *vs.* Watson, decided in 1788, 2 T. R., 201. The party receiving such notice could not be compelled to produce, and was not liable to punishment if he failed to produce. The only consequence of failure to produce was that secondary evidence, if available could be admitted. But if a party in an action at law, desired to prove at the trial the contents of documents in the possession of his adversary, and was not able to produce secondary evidence of those contents, then he could file in chancery a bill against his adversary to compel him to disclose those contents under oath, either by answer setting forth the contents in full, as was the earlier practice, or, as was the later practice, by appending to his answer a schedule containing a specific description of the documents in his possession, the discovery of the contents of which was sought. In the latter case an order could be secured from the Chancellor requiring the defendant to leave the documents with a designated officer for the inspection of the complainant. In Crowley *vs.* Perkins, 5 Sim., 552, decided in 1852, the defendant to a bill for discovery in aid of an action at law was ordered to produce at the trial of the action at law certain documents, which in his answer he admitted were in his possession. This order, however, was declared in Brown *vs.* Thornton, 1 Myl. & C., 243, to have been without authority. In the latter case, the court held that, on a pur- bill for discovery in aid of an action at law, all the court of chancery can do is to compel the discovery, that the proceeding ends when the discovery is made, that no decree is entered thereon, that the defend-
38 ant is then entitled to his costs, and that the complainant, having obtained the discovery, is left to make the best use of it that may be permitted by the court having jurisdiction of the action at law. In a case in chancery where a bill is filed for equitable relief, and also for discovery in aid of that relief, the Chancellor has always had the power, subject to certain exceptions not now necessary to be mentioned, to order documents in the possession of one of the parties to be produced on final hearing, or before the examiner who takes the evidence for final hearing, or even at any time after the filing of an answer. 3 Dan. Chan. Pl. & Pr. (1st Am. Ed.) 2064; Utah Const. Co. *vs.* Montana R. Co., 145 Fed., 981; Herbert *vs.* Dean & Chapter of Westminster, 1 P. Williams, 773; Bettison *vs.* Farrington, 3 P. Williams, 363.

It is to be observed, then, that previous to 1789, a discovery by a party to an action at law could have been obtained only by the filing of a bill in chancery. That court had the power, in every such case, and also in every case for discovery and full relief in chancery, to compel the production of documents. On a pure bill for discovery in aid of an action at law, the power was exhausted when the documents were produced and the discovery made. On a bill for discovery and relief, the documents might be required to be produced

either before or at the final hearing. The commentaries of Sir William Blackstone appeared a few years previous to 1789. That learned expounder of the principles of the common law (3 Black. Comm., 382) in speaking of defects in the trials of actions at law, mentioned, first, the want of a complete discovery by the oath of the parties, saying:

"It seems the height of judicial absurdity that in the same cause, between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster Hall, and denied on the other; or that the judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar; but, when sitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it." The second defect mentioned by him was stated in these words: "A second defect is of the nature somewhat similar to the first—the want of a compulsive power for the production of books and papers belonging to the parties. In the hands of third persons they can generally be obtained by rule of court, or by adding a clause of requisition to the writ of subpœna, which is then called a *subpœna duces tecum*. But, in mercantile transactions especially, the sight of the party's own books is frequently decisive; as the day-book of a trader, where the transaction was recently entered as really understood at the time, though subsequent events may tempt him to give it a differ-
39 ent color. And, as this evidence may be finally obtained, and produced on a trial at law, by the circuitous course of filing a bill in equity, the want of an original power for the same purposes in the courts of law is liable to the same observations as were made on the preceding article."

The author of the Judiciary Act of 1789 is supposed to have been Oliver Ellsworth. Virginia *vs.* Rives, 100 U. S., 313, 358. That he was influenced by these criticisms of Blackstone in embodying in that act powers theretofore exercised only by the Chancellor, seems very probable from the following excerpt from Maclay's Journal (p. 92) concerning the procedure before the United States Senate when that body, sitting as a Committee of the Whole, were considering the act: "Up now rose Ellsworth, and in a most elaborate harangue supported the clause (the clause requiring a defendant on oath to disclose his knowledge of the case, which was subsequently stricken out), now in chancery, now in common law, and now common law again with a chancery side. He brought forward Judge Blackstone and read much out of him. Patterson rose in reply and followed him through these thorny paths I thought, with good success. He showed, justly enough, that Blackstone cut both ways, and nothing could be inferred from him but his ridiculing the diversity of practice between chancery practice and that of the common law." But whatever influence may have led to the framing of Section 15 of the original Judiciary Act, the question now presented is whether it was the object of that section to give a complete or only a partial substitute for the chancery proceeding. It seems to have been the first statutory provision

in England or in this country, extending to courts of law the power of a court of chancery to compel a party to produce documents. In some of our states similar legislation was soon adopted, but it was sixty-two years before any such power was given to the courts of law in England. 1 Thomp. on Trials, sec. 731. The section authorizes the Federal Courts to make orders for the production of books or writings, not "in actions at law," not "in proceedings in action at law," but "in the trial of actions at law." Bearing in mind that a court of chancery had the power to require a party to produce books or writings in a case in which that court was called on to administer relief as well as to compel discovery, either before or at the final hearing, the language of the section now under review seems to be restrictive. One of the first cases in which it came before a court for consideration was Bas *vs.* Steele, 3 Wash. C. C., 381, and Fed. Cas. No. 1,058. In that case Mr. Justice Washington, sitting in circuit for the district of Pennsylvania, in 1818, after considering other questions said:

"The remaining point is important and novel, and has not yet been decided in the Supreme Court, in this court, or in any other Circuit court, so far as we are informed. It is not difficult to give a construction to the section of the act of Congress. When either party wants papers, he must give notice; and he has in view one of these objects: 1st. That if the papers called for are not produced, he may be enabled to argue against the party not producing them to the jury; 2d. This object may be to obtain evidence from the contents of the papers called for, and; 3d. To move the court for a non-suit, or for a judgment by default, as the case may be. But in either case, the party must entitle himself to the benefits of the section by showing that the party was in possession of the papers called for; and he must also give evidence of the contents of the papers; for it will not do for him only to say what those contents are. The court will require reasonable proof of the possession, and of the pertinency of the papers. If the object of the party is to avail himself of the provisions of the section, so as to move for a non-suit, or for judgment by default, he must put the party on his guard and let him know the consequences of a refusal, and the party receiving such notice will come prepared to meet it. In any such case, when the party is called on to produce papers, he may make oath that he has them not, and thus extricate himself from difficulty. This is the case in chancery, where the plaintiff charges the defendant with having papers to which he has a right, and the defendant relieves himself by his oath; and this may be met by contrary proof of two witnesses. In every case, the party claiming the papers must give evidence of the relevancy of the papers, and of the opposite party having possession of them. Whenever a judgment by default, or a non-suit, is intended to be claimed, the notice to produce papers must give the party information that it is intended to move for a non-suit, or a judgment by default, as the case may be; and this must hereafter be considered as the rule of the court under this section of the Act of Congress."

In Dunham *vs.* Riley, 4 Wash. C. C., 126, and Fed. Cas. No. 4,155,

Mr. Justice Washington, in 1821, followed Bas *vs.* Steele, and added that the court did not in that case decide whether the order to produce papers should be absolute in the first instance. He said: "We think it need not be so, but that upon the rule to show cause it may be made *nisi,* leaving the court at liberty to enforce the rule, unless the plaintiff can show, at the trial, good cause for not producing them. If the rule be made absolute at the time when it is argued, the court might have to go prematurely into an inquiry into the case, in order to decide whether the order should be absolute or not. If the case should be simple, and such inquiry should not appear to be necessary, the court may at once discharge, or make the rule absolute."

41 In this case the argument was on a rule upon the plaintiff requiring him to show cause why he should not be required to produce certain books, papers and accounts at the trial of the action. Justice Washington granted a rule *nisi.*

In Iasigi *vs.* Brown, Fed. Cas. No. 6,993 and 1 Curt. 401, decided in 1853, Mr. Justice Curtis, sitting in circuit for the district of Massachusetts, said:

"By the common law, a notice to produce a paper merely enables the party to give parol evidence of its contents, if it be not produced. Its non-production has no other legal consequence. This act of Congress has attached to the non-production of a paper, ordered to be produced at the trial, the penalty of a non-suit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making such a case and obtaining such an order as the act contemplates. * * * The application for such an order may be made, on notice, before trial. There is manifest convenience in allowing this. But, at the same time, I think the court should not decide finally on the materiality of the paper, except during trial, because it would occupy time unnecessarily, and it might be very difficult to decide beforehand whether a paper was pertinent to the issue, and whether it was so connected with the case that a court of equity would compel its production. These points could ordinarily be decided without difficulty during a trial after the nature of the case and the posture and bearings of the evidence are seen."

It was further said in this case that the correct practice seems to be that, after the moving party has made a *prima facie* case for such an order, he shall enter an order *nisi,* leaving it for the other party to show cause at the trial.

As already stated, a number of cases may be cited in which orders to produce books or writings before trial were made. The most exhaustive review of the decisions on both sides of the question, contained in any single case, is to be found in Bloede Co. *vs.* Bancroft & Sons Co., 98 Fed., 175. In that case, it was held that a Federal court may make an order to produce before the trial. In the opinion of the learned judge who decided that case, there is however, no reference to Bas *vs.* Steele or to Dunham *vs.* Riley. The penalty incurred by one who fails to produce books under an order made pursuant to Section 724 may be a judgment in the action against

him. If the order be to produce at the trial, and the party against whom it is made fails to comply therewith, or, producing the
42 books, insists that they are not admissible, the ruling of the court awarding judgment against the defaulting party for non-production, or its ruling on the question of the admissibility of the books, may be the subject of a bill of exceptions and be reviewed on a writ of error bringing up the final judgment in the action. But if the order be to produce before trial, and the party against whom it is made defaults how can judgment of non suit or judgment by default be entered? A judgment must be founded on a record that will support it. An order to produce before the trial constitutes, at common law, no part of the record of the action, neither can it be excepted to. It is well settled practice in our Federal courts that the assignments of error in an action at law are founded only on the record of the case, and the bill of exceptions taken in the course of the trial. Storn *vs.* United States, 94 U. S., 76; Suydam *vs.* Williamson, 20 How. 453; New Orleans Railroad *vs.* Morgan, 10 Wall. 261; Insurance Co. *vs.* Piaggio, 16 Wall. 386. Originally, the record of an action at law consisted only of the process, pleadings, verdict and judgment, and the only errors reviewable on a writ of error were those apparent on the face of such a record. 3 Ency. Pl. & Pr. 378. By the statute of 13 Edw. 1, Chap. 31, authority was given to take bills of exceptions to the rulings of judges at trials, Bacon's Abridg. Tit. Bill of Exceptions; Bulkeley *vs.* Butler, 2 B. & C., 434, 444; Pomeroy's Lessee *vs.* Bank of Indiana, 1 Wall., 592, 599; Wheeler *vs.* Winn, 53 Pa. St., 122, 126. In some of our states, an order striking out pleadings before issue joined, and the like, may now, by statute, be incorporated in the record of an action at law so as to be reviewable on a writ of error. In New Jersey, where, as in the Federal courts, the common law practice prevails, it has been held that if a plea be struck out as sham or frivolous the order cannot be reviewed on a writ of error for the reason that it constitutes no part of the record. In Brown *vs.* Warden, 44 N. J. L., 177, the highest court of that State said:

"The right to overrule and suppress pleadings as sham and frivolous has existed in the superior courts of common law from time immemorial, and no attempt has ever been made before the present occasion to place such incidental orders for review before an appellate court."

The tenacity with which the Federal courts hold to the common law practice on writs of error is well illustrated by the cases of Campbell *vs.* Boyreau, 62 U. S., 224, and Andes *vs.* Slauson, 130 U. S., 435. And in Wright *vs.* Hollingsworth, 1 Pet., 168, it was said:

"The allowance and refusal of amendments in the pleadings, the granting or refusing new trials, and, indeed, most other
43 incidental orders made in the progress of a cause before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their rules and modes of practice. This, it is true, may occasionally lead to particular hardships; but, on the other hand, the

general inconvenience of this court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable."

See also, *Ex parte* Crane, 5 Pet. 199; Evans *vs.* Stettnisch, 149 U. S. 607.

To what extent the statutory practice in some of our States of allowing interlocutory orders to be incorporated in the record of an action at law, and error to be assigned thereon, may be permitted in our Federal courts under the provisions of Section 914 of the Revised Statutes, it is not now necessary to decide; for no act of the Legislature of the State of Pennsylvania has been referred to, nor have we knowledge of any statute of that State, which provides that an order requiring a party in an action at law to produce books, for the inspection of his adversary before trial, may be incorporated in the record of the action, or that error may be assigned thereon. So far as we are aware, no such practice in the Courts of the State of Pennsylvania exists. And Congress has prescribed no such practice for the Federal courts. It seems clear, therefore, that if a party who is ordered to produce books before trial defaults, and a judgment is entered against him merely for that reason, the judgment would necessarily be reversed on error, for want of a record to support it. A construction of Section 724, which limits the power of the court to an order to produce books at the trial, leaves the party against whom the order is made in a position where he may take exceptions to the rulings of the court at the trial, requiring obedience to the order, or concerning the admissibility of the books, and thereby secure a record on which a writ of error will operate. But an order to produce before trial, if it be disobeyed, will be wholly nugatory for the reason that the penalty prescribed by the Section—the entry of judgment against the disobedient party—cannot be lawfully imposed. If this be not so, then an erroneous ruling of the court made at the trial upon an order to produce at the trial may be corrected by an appellate tribunal, while it cannot be in the case of an erroneous ruling concerning an order to produce before trial. A construction leading to such diverse results does violence to the language of the section which authorizes an order to produce only "in the trial of actions at law." We conclude, therefore, that Section 724 does not confer the power to require a party to produce books before trial.

If a party to an action at law desires inspection of books in
44 his adversary's possession before trial of the action, he is left to his chancery remedy by filing his bill for discovery.

The third question is: May the defendant in a civil action brought to recover damages for a violation of any of the provisions of the Interstate Commerce Act be required, under Section 724, to produce its books even at the trial? It is insisted by the plaintiffs in error that this case falls within the operation of the general rule that equity will not compel a party to disclose facts which would tend to expose him to criminal punishment, or to penalties, fines or forfeitures, and that as no order requiring parties to produce books can be made under the authority of Section 724 except "in cases and under circumstances where they might be compelled to produce

the same by the ordinary rules of proceeding in chancery," the order now under review, even in so far as it requires production of books at the trial, is void. Section 8 of the Interstate Commerce Act provides that a common carrier violating any of its provisions "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel fee or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

And Section 10 provides that any common carrier that shall wilfully violate any of the provisions of the Act, or shall be guilty of any infraction of it, "shall be deemed guilty of a misdemeanor," and subject to a fine not exceeding five thousand dollars for each offense. If the books of a defendant will tend to prove a particular violation of the act in a civil case instituted under the authority of Section 8, they will also tend to prove the same violation in a criminal case founded on Section 10.

But a corporation is not a natural person. It is a creature of the State. It possesses no powers or franchises except those conferred upon it by the State. When it accepts its charter from the State it voluntarily subjects itself to all the obligations and duties constitutionally imposed upon it by the State. So when it engages in Interstate Commerce it is subject to all the regulative provisions concerning such commerce constitutionally prescribed by Congress. Whether it may not, in a case like the present one, be compelled to produce its books and papers at the trial of a civil action against it, even if such production shall disclose criminal acts by it, is a question that has not been argued. There is, also, in this connection, another question that has not been argued, and that is whether a corporation, in a case like this, may refuse to produce its books or papers because of the provisions of the Fourth Amendment
45 of the Constitution against unreasonable searches and seizures, or of the provision of the Fifth Amendment that no person shall be compelled to be a witness against himself. In Hale *vs.* Henkel, 201 U. S., 43, Fr. Mr. Justice Brown, at page 70, said:

"The question whether a corporation is a 'person' within the meaning of this (the Fifth) Amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees."

On pages 75 and 76 he said:

"Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with the violation of a statute of the State of its creation, or of an Act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation; we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures."

On page 77, Mr. Justice Harlan declared that, in his opinion, a

corporation is not embraced by the word "persons" in the Fourth Amendment. On pages 82 and 83 Mr. Justice McKenna leaves open the question whether a corporation can claim immunity under either the Fourth or the Fifth Amendment. And on page 88 Mr. Justice Brewer says that "the fact that a State corporation may engage in business which is within the general regulating power of the National Government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments." These varying expressions of opinion emphasize the impropriety of any expression of opinion by us, on the third question above stated, before counsel shall have given us the aid of full arguments thereon. Furthermore, the question is not now properly before us. Objections to an order to produce books at the trial should be made as in the case of a subpœna *duces tecum*, at the trial, when, as already shown, exceptions to the rulings of the trial court may be taken as the foundation of a writ of error bringing up the final judgment in the action.

The fourth question is: Is not the order of the Circuit Court void for failure to describe with sufficient definiteness the books and papers required to be produced? And the fifth and last question is: Is not the order erroneous because of the allegation of the defendant that its books have not been so kept as to show what rebates, drawbacks, compensation or concessions, it has allowed to the several parties named in the plaintiffs' petition? Neither of these
46 questions is now properly before us. Like the third question, they may perhaps be properly raised on an order directing the defendant corporation to produce its books at the trial of the action, but even in such case they can be raised only at the trial.

Having reached the conclusion above expressed, it follows that the motion to dismiss the writ of error must be denied, and that the judgment of the Circuit Court must be reversed with costs, and it is so ordered.

Filed, January 2, 1907.

In the United States Circuit Court of Appeals for the Third Circuit.

ALEXANDER J. CASSATT ET AL., Plaintiffs in Error,
vs.
MITCHELL COAL AND COKE COMPANY, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Dissenting Opinion.

BUFFINGTON, *J.:*

This court, in my judgment, has no jurisdiction on this writ of error. I therefore dissent. In the Circuit Court, the Mitchell Coal and Coke Company brought suit against the Pennsylvania Railroad

Company, to recover damages for alleged violations of the Interstate Commerce Act. On petition of the Coal Company and in pursuance of alleged power under R. S. Sec. 724, that court, after hearing on answer made by the Pennsylvania Railroad Company alone (the plaintiffs in error making no answer or objection) ordered that certain books and records of that company be produced by its officers at the trial and also prior thereto at the Railroad Company's own office, for inspection and making copies thereof. This order the Railroad Company neither excepted to or appealed from. That such an order was interlocutory and not appealable is held in Logan *vs.* Pennsylvania R. R. Company, 132 Pa. St., 403, a decision adopted in Alexander *vs.* United States, 201, U. S., 122. To the entry of such order, however, the plaintiffs in error, who were the officers of the Railroad Company named in the order, ex-
47 cepted, as individuals and have removed to this court by writ of error the record in the case. Now these plaintiffs in error have no property in the books, being the mere custodians thereof as officers of the railroad; the- made no answer in the proceedings below, their rights were not involved, considered or adjudicated and no disclosures are now sought from them. Indeed, as mere custodians of the books and papers in question as officers of the railroad, they bear an even more remote relation to the case below than did the plaintiffs in error in Nelson *vs.* The United States, 201 U. S., 115, of whom it was said: "These writs of error are not prosecuted by the parties in original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. Being witnesses merely it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issue between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal." Seeing then that these plaintiffs in error are not parties to the case between the Coal Company and the Railroad Company, they are not concerned in that controversy or affected by its disposition. It is clear that their controversy is wholly one between them and the sovereign power acting through one of its courts: Alexander *vs.* United States, *supra,* which court has ordered them, as officers of a third party, to produce certain books of such third party in their custody. And it is equally clear that that court has yet made no order against them in that regard which is final. The order to produce in no way affects their liberty, their property or their liability. It is no more final than a subpœna with a *duces tecum* clause directing them to produce documents in their possession would be. An attachment for contempt is requisite to constitute a final and appealable decree in case of a subpœna of that character: Alexander *vs.* United States *supra.* It is urged, however, that under R. S. Sec. 724, the Circuit Court cannot enforce its order to produce by an adjudication for contempt for non-production, and that because it cannot attach, an order to produce is the last order the court can make, and therefore, a final one. Not only is this a *non sequitur,* but that a Circuit Court is powerless to enforce by attachment for contempt, an order which by statute it is empowered to make, is a proposition I am not yet pre-

pared to concede, if that question were before us. In that connection it suffices to say that if the construction placed on this statute by Mr. Justice Washington in Bas *vs.* Steele, 3 Wash. C. C. 381, Fed. Cas. 1088, be correct, namely, that the objects of the statute are not only to lay grounds for a judgment of default, but also "to obtain evidence from the contents of the papers called for," it may well be contended that the Circuit Court, under its general powers as a court, can by attachment compel production of that evidence which it was the object of the statute it should obtain. But assuming, for present purposes only, the court has no power to attach, it by no
48 means follows that the more order on such a custodian of papers as here to produce is a final decree simply because the court can do no more. Such order lacks all the elements of a final, reviewable decree. It subjects such custodian agent to no liability either in person or property; he is not concluded, affected or harmed by such order, it enters no judgment, default, lien or decree against him; it subjects him to no penalty and he is not aggrieved thereby. But apart from this, if the only power the court has under this statute is to enter a judgment by default, then the entry of such default and the liquidation of a judgment in the final decree, under the act which makes the case appealable, and then the appeal is by the party aggrieved and not by the mere custodian of such party's books and records. No judgment by default having been entered and liquidated, it follows that no final appealable decree was entered. To entertain this writ is to concede to a stranger to the controversy higher rights than the litigants themselves possess. Whether this order to produce is valid, whether it warrants a judgment by default against the defendant are matters in which these plaintiffs in error have no concern. If the court below finally entered judgment on default, in that case these questions could be properly subjected to review by the aggrieved party, the Pennsylvania Railroad. But in advance of that time these plaintiffs in error—whether they seek to do it as mere individuals or as officers of that company—cannot under cover of an alleged final decree in a mere order to produce, confer on this court by indirection a jurisdiction to review in a preliminary stage questions between the Coal and Railroad Companies which neither of said companies can have reviewed until final decree. For these reasons I would dismiss this writ of error for want of jurisdiction.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1906.

No. 6.

ALEXANDER J. CASSATT and Others, Plaintiffs in Error,
vs.
WEBSTER COAL AND COKE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

49 This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause, be, and the same is hereby reversed with costs.

Philadelphia, January 7, 1907.

GEO. GRAY,
Circuit Judge.

UNITED STATES OF AMERICA, *sct:*

I, William M. Merrick, Clerk of the Circuit Court of Appeals, for the Third Circuit, do hereby certify that the foregoing pages, from 1 to 49 inclusive, to contain a full, true, complete and faithful copy of the original transcript of record in the case wherein, Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson and R. L. Head, are Plaintiffs in Error, and the Webster Coal and Coke Company is Defendant in Error, on file and now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this Eleventh day of February, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

50 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Alexander J. Cassatt, John B. Thayer, Charles E. Pugh *et al.*, are plaintiffs in error, and Webster Coal and Coke Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

51 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of April, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

52 [Endorsed:] File No. 20,670. Supreme Court of the United States. No. 705, October Term, 1906. Webster Coal & Coke Co., *vs.* A. J. Cassatt *et al.* Writ of Certiorari.

53 In the United States Circuit Court of Appeals for the Third Circuit.

WEBSTER COAL AND COKE COMPANY, Plaintiff in Error,
vs.
ALEXANDER J. CASSATT, JOHN B. THAYER, ET AL., Defendants in Error.

Stipulation.

And now, to wit, this 3rd day of May, 1907, it is hereby stipulated and agreed by and between George S. Graham, Esq., Attorney for the Plaintiff in Error in the above case, and John G. Johnson, Esq., Attorney for the Defendants in Error in the above case, that the copies of the transcript of record of the above case, certified by the Clerk of the said Circuit Court of Appeals for the Third Circuit, now in the Supreme Court of the United States, may be adopted and

used as the record of said case for all purposes in the said Supreme Court of the United States.

GEO. S. GRAHAM,
Attorney for Plaintiff in Error.
JOHN G. JOHNSON,
Attorney for Defendants in Error.

(Indorsed:) Circuit Court of Appeals for the Third Circuit. No. 8 Oct. Term 1906. Webster Coal & Coke Co., Plaintiff in Error, *vs.* Alexander J. Cassatt, John B. Thayer, *et al.*, Defendants in Error, Stipulation. Filed May 6, 1907.

54 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, by virtue of the foregoing Writ of Certiorari and in obedience thereto do hereby certify to the Supreme Court of the United States the consent of the Counsel for the respective parties thereto annexed as my return to the said writ:

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this seventh day of May in the year of our Lord one thousand nine hundred and seven and of the Independence of the United States the one hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

55 [Endorsed:] 705, 20670. No. — Term, 190–. United States Circuit Court of Appeals, Third Circuit. Certified Copy.

56 [Endorsed:] File No. 20670. Supreme Court U. S. October term, 1907. Term No. 283. Webster Coal and Coke Company, petitioner, *vs.* A. J. Cassatt *et al.* Writ of certiorari and return. Filed May 8th, 1907.

(20,671.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 284.

PENNSYLVANIA COAL AND COKE COMPANY, PETITIONER,

vs.

A. J. CASSATT, JOHN B. THAYER, CHARLES E. PUGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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United States Circuit Court of Appeals for the Third Circuit, October Term, 1906.

No. —.

ALEXANDER J. CASSATT, JOHN B. THAYER, CHARLES E. PUGH, W. W. ATTERBURY, MICHAEL TRUMP, R. M. PATTERSON, J. G. SEARLES, GEORGE W. CREIGHTON, WILLIAM W. STRONG, OSCAR A. KNIPE, WILLIAM J. BINGHAM, A. E. FITLER, WILLIAM A. THOMPSON, CHARLES R. STRONG, CHARLES KINGSMORE, A. D. ROBERTSON, and R. L. HEAD, Plaintiffs in Error,

vs.

PENNSYLVANIA COAL AND COKE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Filed May 8, 1906.

1

Assumpsit.

October Session, 1904.

PENNSYLVANIA COAL & COKE CO.

vs.

PENNSYLVANIA RAILROAD CO.

1905, January 24. Precipe for summons filed. Summons exit returnable first Monday of February next. Statement of claim filed.

1905, January 26. Proof of service of copy of statement filed.

1905, February 9. John G. Johnson, Esq., appears for Defendant. Affidavit of defence filed.

1905, February 15. Summons returned served.

1905, February 21. Rule to plead filed.

1905, March 11. Plea filed.

1905, April 11. Petition for an order on Deft. to produce books, &c.

1905, April 11. Argued sur motion for an order on Deft. to produce books. Answer of Defendant filed.

1905, April 12. Order directing Defendant to produce certain papers, &c.

1905, April 14. Exceptions to order to produce books, &c., filed.

1905, April 14. Assignments of error filed. Petition and order

allowing writ of error. Writ of error allowed and copy thereof lodged in Clerk's office for adverse party. Citation allowed and issued. Citation returned, service accepted. Bond sur writ of error approved and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court,
2 before you, or some of you between The Pennsylvania Coal and Coke Company and Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head, a manifest error hath happened, to the great damage of the said Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 14th day of April, in the year of our Lord one thousand nine hundred and six (1906).

[SEAL.] SAMUEL BELL,
Clerk of the Circuit Court of the United States.

Allowed,
BY THE COURT.
Attest:
SAMUEL BELL, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Pennsylvania Coal and Coke Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pur-
3 suant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John B. McPherson, Judge holding Circuit Court of the United States this fourteenth day of April, in the year of our Lord one thousand nine hundred and six (1906).

BY THE COURT.

Attest:
(Signed) GEORGE BRODBECK, JR., *Pro Clerk.*

Service accepted—
(Signed) DAVID L. KREBS,
Att'y for Def't in Error.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Issue summons in Assumpsit in the above cause, returnable to first Monday of February, 1905.
(Signed) THOS. H. ATHERTON,
Attorney for Plaintiff.

Jan. 1905.

Endorsed: No. 74. Oct. Term, 1904. In Circuit Court of U. S., Eastern District of Pennsylvania. Pennsylvania Coal & Coke Co. *vs.* Pennsylvania Railroad Co. Præcipe for Summons. Filed Jan. 24, 1905. Samuel Bell, Clerk.

4 UNITED STATES, *Eastern District of Pennsylvania, sct:*

The President of the United States to the Marshal of the Eastern District of Pennsylvania, Greeting:

We command you, that you summon Pennsylvania Railroad Company, late of your District, if it may be found therein, so that it be and appear before the Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in and for the Third Circuit, at a Session of the same Court to be holden at Philadelphia on the first Monday of February next, to answer to Pennsylvania Coal & Coke Company, in a plea of Assumpsit. And have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 24th day of January, A. D. 1905, and in the 129th year of the Independence of the United States.

(Signed) GEORGE BRODBECK, JR.,
Pro Clerk of Circuit Court U. S.

Endorsed: No. 74. October Session, 1904. Circuit Court. Pennsylvania Coal & Coke Co. *vs.* Pennsylvania Railroad Co. Summons Assumpsit. Filed Feb. 15, 1905. Samuel Bell, Clerk. Returnable on the first Monday of February next. Thos. H. Atherton, Attorney for Plaintiff.

Return, Jan'y 25, 1905, at Philada. in my district served the within writ on Pennsylvania Railroad Co. by giving a true and attested copy thereof to A. J. County, Ass't Sec'y of said Company, making contents known. So answers Jno. B. Robinson, U. S. Marshal, per Jos. H. Huddell, Deputy.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, —— Term, 1905.

No. —.

PENNSYLVANIA COAL & COKE COMPANY, Plaintiff,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant.

5 *Plaintiff's Statement.*

The Pennsylvania Coal and Coke Company files this statement of its claim and demands against the Pennsylvania Railroad Company, and for causes of action alleges as follows:

First. That the Pennsylvania Coal and Coke Company is a corporation of the State of Pennsylvania, and the owner of large bodies of bituminous coal lands in the Counties of Cambria, Blair and Indiana, State of Pennsylvania, and at the times hereinafter mentioned

was, and now is, engaged in the business of mining, producing and shipping coal and coke thereon and therefrom.

Second. That the Pennsylvania Railroad Company is a corporation of the State of Pennsylvania, having its principal office in the City of Philadelphia, in said State, and is a common carrier engaged in the transportation of passengers and property both wholly by railroad and partly by railroad and partly by water, under a common control, management or arrangement for a continuous carriage or shipment from within the State of Pennsylvania to other States of the United States and to foreign countries, and is subject to the provisions of the Act of Congress of February 4th, 1887, entitled "An Act to Regulate Commerce" and the various amendments thereto; that said defendant among its branches or divisions controls and operates what are known as the Tyrone Division, Pittsburgh Division, Cambria and Clearfield Division, Pennsylvania and Northwestern Division, Western Pennsylvania Division and Monongahela Division.

Third. That the said mines of the plaintiff and the mines of other shippers of bituminous coal, especially those of the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company, are situated along or near defendant's said divisions and its main line of railroad west of Altoona and east of Pittsburgh, and that all of the coal and coke produced and shipped from the lands of the plaintiff during the period from May 1st, 1902, until January 1st, 1904, was shipped over said main line and divisions of the defendant largely to points without the boundaries of the State of Pennsylvania, by continuous carriage or shipment, and under the control and management of defendant.

Fourth. That the defendant during all the aforesaid period arbitrarily assumed the right to estimate and determine the capacity to produce coal of the mines of the plaintiff and did in fact estimate and fix upon what it declared and published to be the capacity of the mines of the plaintiff as well as the capacity of the mines of the Berwind-White Coal Mining Company, the Keystone Coal and Coke Company and other shippers of coal along its said main line and divisions, upon the basis of which rating of capacity it further-

6 more assumed the right to determine and did in fact estimate and fix upon the percentage of cars which it claimed plaintiff was entitled to have and receive daily out of the total number of cars which were to be distributed by defendant upon and along its said main line and divisions for the transportation of coal.

Fifth. That the actual capacity of plaintiff's mines to produce coal was at all times much greater than that estimated and fixed upon by defendant, as aforesaid, and that by reason thereof, plaintiff was subjected to undue and unreasonable prejudice and disadvantage in respect to the estimate made by defendant as to the number of cars apportionable to plaintiff for the transportation of its coal, as will hereinafter be more fully set forth.

Sixth. That at all times during the aforesaid period, that is, from May 1st, 1902, to January 1, 1904, defendant's aforesaid lines of railroad formed the only outlet to market for plaintiff's coal,

and that plaintiff constantly had orders for its coal largely in excess of the output per diem allotted and fixed upon by the defendant, and largely in excess of the carrying capacity of the cars distributed to plaintiff by the defendant, for that purpose; that during all of said period the plaintiff repeatedly demanded from the defendant cars for the transportation of the coal which it was able and ready to mine and ship from its said mines in excess of that actually shipped by it and for which it had a market without the State of Pennsylvania, and which would have entered into and formed a part of the interstate commerce of the country, but that defendant unlawfully, unjustly and unreasonably neglected and refused to furnish plaintiff with the number of cars which it was entitled to receive and which defendant had available for such purpose, and subjected plaintiff to undue and unreasonable prejudice and disadvantage by giving to other and favored shippers in the same region cars which would have gone to plaintiff had the same been distributed by defendant upon the basis of the productive capacity of its mines as compared with that of the mines of such other shippers, especially the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company, and furthermore by issuing orders directing that cars to the number of 500 or thereabouts daily should first be given to said Berwind-White Coal Mining Company before any distribution of cars was made to plaintiff, by actually transferring the title to or control of a large number of its cars to said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company, thus decreasing the supply of cars which said defendant had available for distribution to plaintiff for the shipment of its coal then ready and offered for shipment; by preferring said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company and other shippers in the distribution of cars belonging to other rail-
7 road companies and temporarily on the lines or under the control of the defendant; by preferring said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company and other shippers in the distribution and allotment of cars intended for the fuel supply of defendant in that defendant excluded such cars from the rated allotment of said shippers; by hauling the cars belonging to said Berwind-White Coal Mining Company and Keystone Coal and Coke Company to market when loaded and returning the same as empties with much greater expedition than that which the cars belonging to the plaintiff were moved; and by other wrongful acts.

Seventh. That the amount of coal which the defendant thus as aforesaid wrongfully deprived plaintiff of the right to mine, ship and sell in the open market and the amount which plaintiff could and would have sold and shipped except for the discrimination and favoritism aforesaid was 590,688 tons.

Eighth. That in addition to the loss and damage occasioned to plaintiff by said defendant through its failure, as aforesaid, to furnish plaintiff with its proper quota of cars, said plaintiff suffered a further loss by reason of the consequent curtailment of the output of its said mines, thereby increasing the cost of mining the coal ac-

tually mined and shipped by said plaintiff during the aforesaid period.

Ninth. That by reason of the aforesaid acts of unjust and unlawful discrimination practiced by the defendant in favor of other shippers and in violation of its duty as a common carrier the plaintiff has suffered damages to the amount of $382,965.09.

Second Cause of Action.

For a second and separate cause of action plaintiff repeats and renews each and every allegation contained in the paragraphs numbered "First" and "Second" of this complaint with the same force and effect as though here again stated fully and at length, and further alleges:

Tenth. That on or about September 1st, 1903, the plaintiff purchased from the Webster Coal and Coke Company, a Corporation of the State of Pennsylvania, all of its coal lands and the improvements thereon, that a part of the property so purchased was the so-called Gallitzin Colliery, situated near the defendant's main line of railroad west of Altoona, and that in the same vicinity are collieries then and ever since owned by the Altoona Coal and Coke Company and the Glen White Coal and Coke Company, that all of the coal and coke produced and shipped from said Gallitzin colliery from the time of its acquisition by plaintiff until the present time was shipped over the railroads of defendant largely to points
8 without the boundaries of the State of Pennsylvania by continuous carriage or shipment and under the control and management of defendant; that the said Gallitzin colliery of the plaintiff and the collieries of said Altoona Coal and Coke Company and Glen White Coal and Coke Company are connected with defendant's railroad by short lines of railroad owned and operated by the plaintiff and said other companies, respectively; that in the regular course of business it has at all times been and is the practice of defendant to deliver empty cars at the junction of its railroad with said other railroads, and for the respective owners of said collieries to haul with their own motive power such empty cars to their respective collieries and haul them back loaded, and so loaded deliver them to the defendant; that the coal and coke so as aforesaid delivered to the defendant for transportation from all of said collieries was carried to the same general markets and that the defendant in the transportation of all of said coal and coke did for the plaintiff and for the said Altoona Coal and Coke Company and Glen White Coal and Coke Company like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Eleventh. That the defendant without the knowledge of the plaintiff allowed and paid to said Altoona Coal and Coke Company and Glen White Coal and Coke Company respectively during said period from September 1, 1902, to November —, 1904, a special rebate or drawback of 15 cents per ton on all of the coal and coke which said companies respectively hauled from their said collieries and delivered

to defendant, but allowed no rebate or drawback or any compensation whatsoever for the coal and coke hauled by the plaintiff from its said Gallitzin Colliery and delivered to defendant.

Twelfth. That during the said period from September 1st, 1903, to November 4th, 1904, the plaintiff hauled from its said Gallitzin colliery and delivered to the defendant for transportation to market upwards of — tons of coal and coke, and for the service rendered to the plaintiff in the transportation of the same, defendant, by such aforesaid rebate or drawback charged, demanded, collected and received from the plaintiff a greater compensation to the extent of fifteen cents per ton of coal and coke than it charged, demanded, collected or received from said Altoona Coal and Coke Company and Glen White Coal and Coke Company, and that by reason of the premises plaintiff has been damaged in the sum of $37,209.15; that payment of said sum has been duly demanded, but that defendant has failed and refused to pay the same or any part thereof.

Wherefore, the plaintiff demands judgment against the defendant for the aggregate sum of $420,174.24.

PENNSYLVANIA COAL & COKE CO.,
By THOS. H. ATHERTON, *Attorney.*

9 In the Circuit Court of the United States for the Eastern District of Pennsylvania, —— Term, 1905.

No. —.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

Albert G. Edwards being duly sworn deposes and says that he is the Secretary of the Pennsylvania Coal & Coke Company, the Plaintiff in this case; that he is conversant with the facts and claims in the foregoing statement or declaration, and that as he verily believes the amount for which suit has been brought *are* justly due and owing from the defendant to the plaintiff.

ALBERT G. EDWARDS.

Sworn and subscribed before me this 11th day of January, 1905.

HARRY J. REBMAN,
[SEAL.] *Notary Public.*

Commission expires March 13th, 1905.

I hereby certify that I am not a Stockholder, Director or Clerk in the Corporation for which I hereby act as Notary Public.

Endorsed: No. 74. Oct. Term, 1904. In Circuit Court of U. S. Eastern Dist. of Penna. Pennsylvania Coal and Coke Co., *vs.* Pennsylvania Railroad Company. Declaration. Filed Jan. 24, 1905. Samuel Bell, Clerk. Thos. H. Atherton, Attorney-at-Law, Wilkesbarre, Pa.

10 In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Personally appeared Jos. H. Huddell, who being duly affirmed, says that in the above case he on Jan'y 25th, 1905, served the defendant with a copy of the Plaintiff's Statement of Claim by giving same to A. J. County, Ass't Sec'y of said Company.

(Signed) JOS. H. HUDDELL.

Affirmed and subscribed before me this 26th day of Jan'y, 1906.

(Signed) T. L. COBAUGH,
[SEAL.] *Deputy Clerk District Court United States, Eastern District of Pennsylvania.*

Endorsed: No. 74. U. S. C. C. E. D. of Pa. October, 1904, Penna. Coal & Coke Co., *vs.* Penna. R. R. Co. Proof of service. Filed Jan. 26, 1905. Samuel Bell, Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Enter my appearance for defendant in the above case.

JOHN G. JOHNSON,
Per C. S. WOODWARD,
Attorney for said Defendant.

February 9, 1905.

To Clerk of the U. S. C. C.

11 Endorsed: No. 74. October Term, 1904. U. S. C. C. Penna. Coal & Coke Co. *vs.* Penna. Railroad Co. Filed Feb. 9, 1905. Samuel Bell, Clerk. Order for Appearance. John G. Johnson, Attorney for Defendant.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

PHILADELPHIA COUNTY, *ss:*

Lewis Neilson *the* duly sworn, says: I am the secretary of corporation defendant in the above entitled cause and make this affidavit on its behalf.

The defendant has a good defence to the whole of plaintiff's claim. It has not been guilty of the wrongful actions alleged in plaintiff's statement of claim.

The defendant has been advised by counsel, and I therefore aver that although the form of the plaintiff's action in this case is in assumpsit, the defendant is not required to file any affidavit of defense therein, because the cause of action set out in plaintiff's statement is not a cause of action arising *ex contractu* in which alone an affidavit of defence can be required under the law and practice in this commonwealth, but is a cause of action arising *ex delicto* in which no affidavit of defence is required.

The defendant therefore denies the right of the plaintiff to require any affidavit of defence in the present case from the defendant.

(Signed) LEWIS NEILSON.

Sworn to and subscribed before me this 2nd day of February, 1905.

HIRAM H. POTTS,
[SEAL.] *Notary Public.*

My commission expires on 26th day of February, 1905.

Endorsed: No. 74. October Term, 1904. U. S. C. C. Pennsylvania Coal & Coke Co., *vs.* Pennsylvania R. R. Co. Affidavit of Defence. Filed Feb. 9, 1905. Samuel Bell, Clerk. John G. Johnson.

12 In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Sessions, 1905.

No. —.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

To Hon. Samuel Bell, Clerk, &c.:

Issue Rule directed to the defendant and in the above entitled cause to enter a plea within fifteen days in accordance with Rule of Court No. 20.

(Signed) THOS. H. ATHERTON,
Per D. L. KREBS,
Attorney for Plaintiff.

Endorsed: 74, Oct. 1904. U. S. C. C. E. D. of Pa. Penna. Coal & Coke Co. *vs.* Penna. R. R. Co. Rule to plead. Filed Feb'y 21, 1905. Samuel Bell, Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Defendant in the above pleads "Not Guilty."

JOHN G. JOHNSON,
Per E. A. WATERS,
Attorney for said Defendant.

March 11, 1905.
To Clerk of U. S. C. C.

Endorsed: No. 74, Oct. Sessions, 1904. U. S. C. C. Eastern District of Penna. Penna. Coal & Coke Co. *vs.* Penna. R. R. Co. Plea. John G. Johnson, Attorney for Defendant. Filed March 11, 1905. Samuel Bell, Clerk.

13 In the Circuit Court of the United States for the Eastern District of Pennsylvania, Oct. Term, 1904.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY, Plaintiff,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant.

To the Pennsylvania Railroad Company, Defendant, John G. Johnson, Esq., Counsel:

You are respectfully herewith notified that on the pleadings herein and the annexed affidavit of Robert Mitchell, Agent and representative of the Plaintiff, verified the 6th day of April, 1906, and the annexed affidavit of David L. Krebs, Attorney of the Plaintiff, and verified the 6th day of April, 1906, an application and motion will be made to the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, on the 11th day of April, 1906, at 10 o'clock A. M. for an order on the Defendant Company, its officers, agents and employees, to produce before the trial of the action and at such time and place as to the Court may seem proper, the following books, documents and writings, to wit:

The Daily Distribution Sheets and records showing the rated output capacity of the several mines and collieries on the several Divisions of the Defendant Company's roads and branches, as enumerated and set forth in the subjoined petition, and particularly those showing the number of cars distributed daily to the said Berwind-White Coal Mining Company and the Keystone Coal and Coke Company, as well as the Plaintiff's, as well as the percentage of cars which the said Plaintiff was entitled to receive under the rating and distribution sheets aforesaid, and which it would have been entitled to receive had it received its due proportion of the daily number of cars for daily distribution, and which were distributed each and every day during the period of time between the first day of May, 1902, and the first day of January, 1904.

Also that said Defendant Company, its officers, agents and employees, produce before the trial of the action, the books, records and documents showing the transfer of coal cars of the Defendant Company to the Berwind-White Coal Mining Company and the Keystone Coal & Coke Company, between the first day of October, 1901,

14 and the first day of January, 1904, and also for the production of the special orders issued for the distribution of 500 coal cars daily to the Berwind-White Coal Mining Company, and also all special orders for the distribution of cars to the said Berwind-White Coal Mining Company and the Keystone Coal and Coke Company or any other shippers between the said first day of October, 1901, and the first day of January, 1904, and also to produce the order dated between the first day and the fifth day of February, 1903, directing the cancellation of all special orders issued at any time prior to that date, and to permit the Plaintiff, by its agents,

and employees, to copy and make abstracts of said books, documents and writings, and direct that the Defendant, upon failure to comply with said order shall suffer judgment by default herein, and for such other and further relief as to the Court may seem just and proper.

PENNA. COAL & COKE CO.,
By Its Attorneys, JOHN W. GRIGGS,
BENJ. S. HARMON,
DAVID L. KREBS.

Philadelphia, Pa., April 6, 1906.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term, 1905.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY, Plaintiff,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant.

To the Honorable, the Judges of said Court:

The Petition of the Pennsylvania Coal & Coke Company respectfully represents:

First. That it instituted an action against the Pennsylvania Railroad Company to No. 74 October Term, 1905, as above stated in which action it seeks to recover damages from the Defendant's Company therein named upon the following, among other causes of action set forth in its statement as appears on file in your said Honorable Court, to wit:

"Sixth. That at all times during the aforesaid period, that is, from May 1st, 1902, to January 1st, 1904, defendant's aforesaid
15 lines of railroad formed the only outlet to market for plaintiff's coal and that plaintiff constantly had orders for its coal largely in excess of the output per diem allotted and fixed upon by the defendant, and largely in excess of the carrying capacity of the cars distributed to plaintiff by the defendant for that purpose, that during all of said period the plaintiff repeatedly demanded from the defendant cars for transportation of the coal which it was able and ready to mine and ship from its said mines in excess of that actually shipped by it and for which it had a market without the State of Pennsylvania and which would have entered into and formed a part of the Inter-State Commerce of the country, but that defendant unlawfully, unjustly and unreasonably neglected and refused to furnish plaintiff with the number of cars which it was entitled to receive and which defendant had available for such purpose, and subjected plaintiff to undue and unreasonable prejudice and disadvantage by giving to other and favored shippers in the same region cars which would have gone to plaintiff had the same been distributed by defendant upon the basis of the production capacity of its mines as compared with

that of the mines of such other shippers, especially the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company, and furthermore by issuing orders directing that cars to the number of five hundred or thereabouts, daily should first be given to said Berwind-White Coal Mining Company before any distribution of cars was made to plaintiff; by actually transferring the title to or control of a large number of its cars to said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company, thus decreasing the supply of cars which said defendant had available for distribution to plaintiff for the shipment of its coal then ready and offered for shipment; by preferring the said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company and other shippers in the distribution of cars belonging to other railroad companies and temporarily on the lines or under the control of the defendant; by preferring the said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company and other shippers in the distribution and allotment of cars intended for the fuel supply of defendant in that defendant excluded such cars from the rated allotment of said shippers; by hauling the cars belonging to said Berwind-White Coal Mining Company and said Keystone Coal and Coke Company to market when loaded and returning the same as empties with much greater expedition than that with which the cars belonging to the plaintiff were moved; and by other wrongful acts.

Wherefore your Petitioner further represents to your Honorable Court that the Pennsylvania Railroad Company, defendant, made a daily record, partly in print and partly in writing which record was and is commonly known as "the Daily Distribution
16 Sheets" which distribution sheets contained the following matter, that is to say, said daily distribution sheets set forth the daily output capacity of each and every mine producing and shipping bituminous coal from the region known as the Mountain division, the Cambria & Clearfield division, the South Fork division, Tyrone & Clearfield division, and the Pennsylvania and Northwestern division: and said daily distribution sheets do also set forth and contain the percentage of cars for transporting coal and coke which each and every mine was entitled to receive daily out of the whole number of cars for distribution each day. That a sheet containing the record of the rated output capacity of each of plaintiff's mines, as well as the rated output capacity of the mines of the Berwind-White Coal Mining Company and the Keystone Coal & Coke Company, as well as each and every other mine operation, mining or shipping coal over the Defendant's railroad from the divisions aforesaid, is and was made and that in addition to said rated output capacity, said sheets made each and every day contain a statement of the whole number of cars distributed each and every day to each of said divisions, as also to each and every one of the mines in each and every of said divisions as well as a statement showing the number of cars for transportating coal and coke distributed each and every day to the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company

and other favored shippers; and doth in like manner set forth and contain a statement showing the percentage of cars to which each and every one of said mines and operations were entitled to, as well as the mines and operations of the said Berwind-White Coal Mining Company and the Keystone Coal and Coke Company and other shippers, and said daily distribution sheets do also set out and contain the actual number of cars distributed to each and every mine mining and shipping coal from each and every of said several above named divisions of the defendant's railroad and particularly the whole number of cars distributed each and every day unto the said Berwind-White Coal Mining Company and Keystone Coal and Coke Company and other favored shippers as well as the actual number of cars distributed each and every day to the Plaintiff herein named.

That said daily distribution sheets are in the custody and under the exclusive control of the defendant's Company.

That the matter contained therein is pertinent and material to the issue joined in the trial of the above recited case to number 74 October Term, 1905. That the period of time covered by the said daily distribution sheets is from the first day of May, 1902, to January first, 1904, and that inasmuch as there is a separate sheet showing the distribution for each and every working day as well as each and every Sunday on which coal was transported by the defendant's Company and as an examination of said daily distribu-
17 tion sheet is necessary and must be made in order to ascertain not only the rated output capacity of the plaintiff's several mines and operations, mining, shipping and transporting coal over defendant's road from the several divisions, and particularly from the Mountain division of the Pennsylvania Railroad, as well as to prove the whole number of cars for daily distribution on the said several divisions, and particularly the Mountain division and also South Fork division, and to prove the percentage to which each and every of the said operating mines having coal transported by the defendant's Company from the said several divisions, was entitled to have and also to prove the number of cars allotted daily to each of the said operations and particularly the operations of the Berwind-White Coal Mining Company and the Keystone Coal & Coke Company, and to the plaintiff, and said testimony being material and pertinent to the issue trying in said cause, and being under the exclusive control of the defendant, and the plaintiff having no access thereto, the plaintiff respectfully prays the Court that an order be now made directing the defendant Company to permit the plaintiff, by its agent, representative and accountants, to have access to said daily distribution sheets in order that tables and computations may be made therefrom of the material and things heretofore mentioned and set forth and particularly to enable them to show the whole number of cars distributed daily, the percentage to which the plaintiff was entitled and the number of cars actually received by the plaintiff and number of cars actually distributed to and received by the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company as well as the several other operators and

shippers along said line. That by the preparation of such a tabulated statement prior to the calling of the above cause for trial, much time and labor would be saved, and the trial of the cause much expedited and hastened without injuring in the least the defendant Company. That without the production of said records and daily distribution sheets, the trial of said cause will necessarily be prolonged and delayed.

And the petitioner further prays the Court to make such further order as shall require the Defendant Company, its officers, agents, servants and employees to produce the books and records of the Defendant, which contain a record of the transfer of coal cars of the Defendant Company to the Berwind-White Coal Mining Company or the Keystone Coal & Coke Company between the first day of October, 1901, and the first day of January, 1904, and that the said defendant Company shall also produce all books, records and papers containing special orders issued by its officers, agents, servants or employees for the distribution of 500 cars daily to the said Berwind-White Coal Mining Company, and also the books, records and papers containing all special orders for the distribution of cars to the said Berwind-White Coal Min-
18 ing Company, the Keystone Coal & Coke Company or any other shippers of coal, and also to require the said defendant Company, its officers, agents, servants and employees to produce the records containing any and all orders, directions and instructions issued to George W. Creighton, R. M. Paterson, David Steel, J. M. Wallis, George W. Clark, or to any other person or persons whatsoever, ordering and directing the allotment of cars to the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, D. E. Williams & Company or any other shipper of coal and coke over the defendant's lines and particularly any and all orders issued by defendant for the distribution of coal cars to said Companies or either of them or other shippers, between the first day of October, 1901, and the first day of January, 1904, and to produce also the order issued between the first day and the sixth day of February, 1905, revoking all special orders previously issued and then in force for the distribution of cars to said shippers, or either of them, or any other shippers.

PENNA. COAL & COKE CO.,
By Its Attorneys, JOHN W. GRIGGS,
BENJ. S. HARMON,
DAVID L. KREBS,
GEO. S. GRAHAM.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Before me, a Notary Public, in and for said City, personally came Robert Mitchell, who being duly sworn saith that he is the representative and agent of the Pennsylvania Coal & Coke Company, that he has read the above and foregoing petition and that the facts set forth therein are true and correct. That said daily distribution

sheets are in the possession of the defendant Company. That they contain the matter in said petition set forth and that the facts contained in said daily distribution sheets are material and pertinent and necessary to the trial of the plaintiff's cause and that without such production and examination of said paper and tabulated statement of same, the trial of such cause will be greatly hindered and delayed.

(Signed) ROBERT MITCHELL.

Sworn and subscribed before me this 6th day of April, A. D. 1906.

E. CAMILE KLONOWER,
Notary Public.

[SEAL.]

Commission expires June 16, 1909.

19 I acknowledge the above notice has been served upon me but I do not waive any objection to the Court of sufficient notice of the application or any other right.

(Signed) JOHN G. JOHNSON,
Attorney P. R. R. Co.

April 6, 1906.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

David L. Krebs, being duly affirmed, says that he is one of the Attorneys for the Plaintiff in the hereinbefore stated cause, and is familiar with the proceedings herein. That the above entitled action is an action of Law, being an action for damages on account of unjust discrimination, as will appear from the pleadings herein. That the action was duly instituted by service of summons and complaint. That the Defendant's answer was filed and that the cause is now at issue and set for trial on the 23rd day of April, 1906. That the books and documents referred to in the annexed petition and Affidavit of Robert Mitchell, Agent and representative of the Plaintiff, contain evidence pertinent and material to the issue to be tried in such cause.

(Signed) DAVID L. KREBS.

Affirmed and subscribed to before me this 6th day of April, 1906.

E. CAMILE KLONOWER,
Notary Public.

Commission expires Jan. 16, 1909.

Endorsed: No. 74. Oct. Sess., 1904. U. S. C. C. E. D. of Pa. Penna. Coal & Coke Co., *vs.* Penna. R. R. Co. Petition for an order on Deft. to produce certain books, &c. Filed April 11, 1906. Samuel Bell, Clerk.

20 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

No. 74, October Sessions, 1905.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur application and motion for an order on the defendant company, its officers, agents and employees, to produce books, documents and papers prior to the trial of the case and submit the same to the inspection of the plaintiff, its counsel and employees, and permit the same to make copies and abstracts of said books, documents and papers.

Answer of the Pennsylvania Railroad Co.

The Pennsylvania Railroad Company, the Defendant in the above action, for answer to the said Application and Motion, says:

It suggests and submits to the Court that the Plaintiff is not entitled to require it to produce said books, documents and papers, because it is advised by counsel and therefore avers:

(*a*) That the pending action, in which said Application and Motion is made, is of such a character, being brought to recover damages in the nature of penalties, that this Defendant is not obliged to produce its books and papers relating to the transactions covered by the action, either for inspection before the trial or at the trial itself.

(*b*) That even were this an action in which the Defendant could be required to produce at the trial the books and papers relating to the transactions in question, the Plaintiff is not entitled to require it to produce the same before the trial and in the manner and for the purpose sought.

Subject to and without waiving the objections above stated to the granting of the order sought by the Plaintiff, this Defendant further states and shows to the Court that it is unable at the present time to answer as to its ability to produce the distribution sheets referred to in the Plaintiff's petition for the entire period of time referred to therein. It has in its possession a large number of such sheets, but until a more thorough examination is made than it
21 has been able to make as yet in order to determine what sheets it has, it cannot answer definitely as to this.

It has also in its possession a large number of special orders relating to the allotment of cars issued during the period referred to in the Petition; and while it can, therefore, produce such as it has in its possession, if it should be determined that the Plaintiff is entitled to an inspection of these, it submits to the Court that the mere production of these orders would not tend to establish anything in reference to the allotment of cars which was actually made

at any one time or on any one day. The actual allotment made can be shown only from the distribution sheets already referred to.

The Defendant further submits that if any order is made for the production of any papers, it should be confined to such only as related to or affected the allotment of cars made within the period covered by the action.

THE PENNSYLVANIA RAILROAD COMPANY,
By JNO. P. GREEN, *Vice President.*

April 11th, 1906.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Lewis Neilson, being duly sworn according to Law, deposes and says that he is Secretary of the Pennsylvania Railroad Company, the Defendant in the foregoing action; that the above answer is true and correct to the best of his knowledge and belief.

(Signed) LEWIS NEILSON.

Sworn and subscribed to before me this 11th day of April, 1906.

(Signed) C. M. GREER,
Notary Public.

Commission expires January 19th, 1907.

Endorsed: Cir. Court, U. S., Eastern District of Penna. No. 74, October Sessions, 1905. Pennsylvania Coal & Coke Co., *vs.* Pennsylvania Railroad Company. Sur application and motion for an order on Defendant Company., &c., to produce books, documents, papers, &c. Answer of Pennsylvania Railroad Co. Filed Apr. 11, 1906. Samuel Bell, Clerk.

22 In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term, 1904.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY, Plaintiff,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

Before Holland, J.

And now, this 12th day of April, 1906, the petition of the plaintiff and the accompanying motion for an order, on the officers, agents and employees of the defendant, to produce certain books, records and papers, specified and mentioned in the petition, and to permit the plaintiff to have access thereto, prior to the time set for the trial of the above stated cause, having been presented, argued and by us considered; it is adjudged, ordered and decreed that Alexander J. Cassatt, President, John B. Thayer, Fourth Vice Presi-

dent, Head of the Traffic Department, Charles E. Pugh, Second Vice President, Head of Transportation Department, W. W. Atterbury, General Manager, Michael Trump, General Superintendent of Transportation, R. M. Patterson, Superintendent of Freight Transportation, J. G. Searles, Coal Freight Agent, George W. Creighton, General Superintendent, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, R. L. Head, Agents and employees of the Pennsylvania Railroad Company, Defendant, shall produce and submit to the examination by the Plaintiff, its agents, accountants and attorneys, the "Daily Distribution Sheets," made and kept by the Defendant, between the 1st day of May, A. D. 1902, and the 1st day of January, A. D. 1904, both days included, so that the plaintiff may therefrom prepare tabulated statements showing the rated output capacity of the mines of the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, and of the Pennsylvania Coal and Coke Company.

Also the percentage of cars to which the said Berwind-White Coal Mining Company and Keystone Coal and Coke Company, and the plaintiff, the Pennsylvania Coal and Coke Company, each were entitled to receive, as fixed by the Defendant Company, and contained and set forth on said Daily Distribution Sheets, the whole number of cars daily allotted to the Mountain Division, the Cambria and
23 Clearfield Division, the South Fork and Scalp Level Branch or Division, the Pennsylvania & Northwestern Division, and the Tyrone & Clearfield Division of the Pennsylvania Railroad Company, and the whole number allotted daily to the said Berwind-White Coal Mining Company, the Keystone Coal & Coke Company and the said plaintiff, the Pennsylvania Coal & Coke Company over and from said several divisions. And it is further ordered and decreed that the aforesaid officers, agents and employees of the Pennsylvania Railroad Company, shall produce and submit to the inspection of and to make copies of all special orders issued at any time between the 1st day of May, A. D. 1902, and the 1st day of January, A. D. 1904, and which were in force and effect between said dates, although made prior to said 1st day of May, 1902, ordering and directing the distribution of coal cars to the said Berwind-White Coal Mining Company, the Keystone Coal and Coke Company, or any other miners and shippers of coal from any of said several divisions or branches of Defendant's Railroad, especially the order giving, granting and distributing to the Berwind-White Coal Mining Company, five hundred coal cars each day.

The production of said Daily Distribution Sheets and other papers, and the said inspection and examination and preparation of said statements and copies to be made at the office or rooms of the Defendant Company, at Broad Street Station, Philadelphia, Pa., to begin on the 16th day of April, A. D. 1906, and to continue from day to day until fully completed. The Defendant may be represented by its agent or agents or attorney as it may desire.

BY THE COURT.

Attest:

GEORGE BRODBECK, JR., *Pro Clerk.*

Endorsed: U. S. C. C. E. D. of Pa. 74 Oct. Sess., 1904. Penna. Coal & Coke Co., *vs.* Penna. R. R. Co. Order directing Def't to produce certain papers, &c. Filed Apr. 12, 1906. Samuel Bell, Clerk.

24 In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term, 1905.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head, named in the order entered by this Court on April 12, 1906, hereby except to the same.

(Signed) JOHN G. JOHNSON,
Attorney for Exceptants.

Endorsed: No. 74. Oct. Sess., 1904. U. S. C. C. E. D. of Pa. Pennsylvania Coal & Coke Co., *vs.* The Pennsylvania Railroad Co. Exceptions to order to produce books, etc. Filed Apr. 14, 1906. Samuel Bell, Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term, 1905.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur Writ of Error of Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head to order and decree entered April 12, 1906, requiring the production by them of books, records, and papers prior to and at the trial of said cause.

25 *Assignments of Error.*

1. The Circuit Court erred in entering the order and decree of April 12, 1906, requiring the plaintiffs in error to submit to the inspection of the plaintiff, and its counsel, prior to the trial of the said cause, the books, records and papers referred to in said order.

2. The Circuit Court erred in entering the Order and decree of April 12, 1906, requiring the plaintiffs in error to produce at the trial of the cause the books, records and papers referred to in the said order.

(Signed) JOHN G. JOHNSON,
Attorney for Plaintiffs in Error.
G. S. P.

Endorsed: No. 73, Oct. Sess., 1904. U. S. C. C. E. D. of Pa. Pennsylvania Coal & Coke Co., *vs.* Pennsylvania Railroad Company. Assignments of Error. Filed Apr. 14, 1906. Samuel Bell, Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term, 1905.

No. 74.

PENNSYLVANIA COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Petition for Writ of Error.

And now, April 14th, 1906, come Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, R. L. Head, by their Attorney, John G. Johnson, and say:

That on the 12th day of April, 1906, this Court entered an order herein upon application of the Plaintiff and against your petitioners, in and by which order and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of your petitioners, all of which more in detail appear from the assignments of errors filed with this petition.

26 Wherefore your petitioners pray that a Writ of Error may issue in their behalf to the United States Circuit Court of Appeals for the Third Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in the cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

(Signed) JOHN G. JOHNSON,
Attorney for Petitioners.
G. P.

Allowed—
BY THE COURT.

Attest:
(Signed) GEORGE BRODBECK, JR., *Pro Clerk.*

Endorsed: No. 74. Oct. Sess. 1904. U. S. C. C. E. D. of Pa. Pennsylvania Coal & Coke Co., *vs* Pennsylvania R. R. Co. Petition for writ of error and allowance. Filed Apr. 14, 1906. Samuel Bell, Clerk.

Know all men by these presents, that we, Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson and R. L. Head as principals, and the American Surety Company of New York as surety, are held and firmly bound unto Pennsylvania Coal & Coke Company, in the full and just sum of Five hundred dollars, to be paid to the said Pennsylvania Coal & Coke Company, its certain attorney, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this fourteenth day of April, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a session of the Circuit Court of the United States for the Eastern District of Pennsylvania, in a suit depending in said Court, between Pennsylvania Coal & Coke Company, Plaintiff, and the Pennsylvania Railroad Company, Defendant, an order was entered against the said Alexander J. Sassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson
27 and R. L. Head on April 12th, 1906, and the said Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson and R. L. Head having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the order in the aforesaid suit, and a citation directed to the said Pennsylvania Coal & Coke Company citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia, within thirty days.

Now the condition of the above obligation is such, that if the said Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, and R. L. Head, shall prosecute such writ to effect, and answer all damages and costs if they fail to make

their plea good then the above obligation to be void; else to remain in full force and virtue.

Signatures of principals waived.

[SEAL.] AMERICAN SURETY CO. OF NEW YORK,
By R. R. BENEDICT,
Resident Vice President.

Sealed and delivered in the presence of
Attest:
EDWARD P. BAILY,
Resident Assistant Secretary.

Approved—
BY THE COURT.

Attest:
(Signed) GEORGE BRODBECK, JR., *Pro Clerk.*

Endorsed: No. 74, Oct. Sess., 1904. U. S. C. C. E. D. of Pa. Penna. Coal & Coke Co., *vs.* Penna. R. R. Co. Bond sur Writ of Error. Filed Apr. 14, 1906. Samuel Bell, Clerk.

28 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Samuel Bell, Clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the cause of Pennsylvania Coal & Coke Company *vs.* Pennsylvania Railroad Company, No. 74 October Session, 1894, on file and now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 8th day of May, in the year of our Lord one thousand nine hundred and six and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

29 And afterwards, to wit, on the fourth day of October A. D. 1906, this cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Eastern District of Pennsylvania, before Hon. George Gray, and Hon. Joseph Buffington, Circuit Judges, and Hon. William M. Lanning, District Judge, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for the consideration thereof.

And afterwards, to wit, on the second day of January A. D. 1907, comes the parties aforesaid by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinions, to wit:

In the United States Circuit Court of Appeals for the Third Circuit.

ALEXANDER J. CASSATT and Others, Plaintiffs in Error,
vs.
PENNSYLVANIA COAL & COKE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. John G. Johnson, for Plaintiffs in Error.
Mr. Joseph Gilfillan and Mr. George S. Graham, for Defendant in error.

Per Curiam: The record of this case is similar to that in Alexander J. Cassatt *et al.*, plaintiffs in error, *vs.* Mitchell Coal and Coke Company, defendant in error, decided at this term. The same questions of law are presented. The opinion in that case controls the decision of this. The motion to dismiss the writ of error is denied and the judgment of the Circuit Court is reversed with costs.

In the United States Circuit Court of Appeals for the Third Circuit.

ALEXANDER J. CASSATT ET AL., Plaintiffs in Error,
vs.
MITCHELL COAL AND COKE COMPANY, Defendant in Error.

30 In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. John G. Johnson, for plaintiffs in error.
Mr. Joseph Gilfillan and Mr. George S. Graham, for defendant in error.

Before Gray and Buffington, Circuit Judges, and Lanning, District Judge.

LANNING, *District Judge:*

The record of this case shows that the Mitchell Coal & Coke Company, plaintiff, has commenced an action at law in the Circuit Court of the United States for the Eastern District of Pennsylvania, against the Pennsylvania Railroad Company, defendant, to recover damages against the defendant for its alleged violation of sections 2 and 3 of the Interstate Commerce Act, approved February 4, 1887, by discriminating against the plaintiff in the allowance of freight rates on coal and coke. The defendant filed a plea that it was not guilty

After issue was thus joined, and before the time for the trial of the action, the plaintiff filed in the Circuit Court a petition in which, after setting forth the nature of the action at law, and declaring that the defendant, and Alexander J. Cassatt, president, John S. Thayer, fourth Vice-President, and ten other specifically named officers and employees of the defendant, had in their possession or power certain books and papers containing evidence pertinent to the issue, there was a prayer for an order requiring the defendant, and its said officers and employees, to produce said books and papers at the trial, and also for inspection by the plaintiff's representatives before trial. The application for the order was based on section 724 of the Revised Statutes, which is as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue. In cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If the plaintiff fails to comply with such order the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order the court may, on motion, give judgment against him by default."

On presentation of the petition to the Circuit Court, a rule was allowed requiring the defendant and its officers and employees named in the petition, to show cause before the court on a certain day why they "should not produce on the trial of this cause" the books and writings above referred to; and also why they should not produce them at a certain time and place before trial "and permit the
31 plaintiff, its counsel and accountants to inspect the same and take such copies as they may deem proper." The defendant answered the petition setting forth (1) that the action was for the recovery of damages in the nature of penalties, and therefore that the defendant was not obliged to produce its books and papers, either before or at the trial; (2) that even if the action were one in which the defendant could be required to produce its books and papers at the trial, it could not be required to do so before the trial; (3) that the petition did not describe with sufficient particularity the books and papers the production of which was desired, or state the facts which the books and papers would tend to prove; and (4) that the defendant could not produce any books which would show the rebates and drawbacks alleged to have been allowed to other companies, because they had not been so kept as to show any such allowances. With the petition and answer before it, the Circuit Court, on the return of the rule to show cause, "adjudged ordered and decreed" that Alexander J. Cassatt, President, John B. Thayer, fourth Vice-president, and the ten other officers and employees of the defendant, "produce on the trial of this cause" the books and papers described in the petition, and also that they produce them before trial at a specified time and place for the inspection of the plaintiff with leave to the plaintiff to make copies thereof.

This order is now brought before us for review on a writ of error

sued out by Alexander J. Cassatt, John B. Thayer, and the ten other officers and employees of the defendant company.

At the threshold of the case we are confronted with the question, Have we power to review the order on this writ? The defendant in error, the Mitchell Coal & Coke Company, contends that we have not, and moves for the dismissal of the writ on the ground that the order is not a "final decision" within the meaning of Section 6 of the Judiciary Act of March 3, 1891. The expression "final decision" used in that section is equivalent to "final decree" or "final judgment" used in the statutes preceding the enactment of the Judiciary Act of 1891. Brush Electric Company *vs.* Electric Improvement Company, 51 Fed. 560. It is conceded that the writ must be dismissed if the order brought up by it is an interlocutory, and not a final, judgment. What constitutes a final judgment or final decree has often been the subject of discussion by our Federal courts. For the present purpose it will be sufficient to refer to some of the cases in which it has been held that the judgments or decrees under review in appellate tribunals were final.

In Forgay, *et al.*, *vs.* Conrad, 47 U. S., 201, there was a motion to dismiss an appeal from a decree in equity. The bill of complaint had been filed by an assignee in bankruptcy to secure a decree setting aside as fraudulent, deeds made by the bankrupt for his lands and slaves.

A decree was ultimately secured setting aside certain of the
32 deeds made to certain of the defendants in the suit, and providing "that the complainant do have execution for the several matters aforesaid in conformity with the law and the practice prescribed by the rules of the Supreme Court of the United States." The decree also contained a clause directing a master to take an account of the profits of the lands and slaves ordered to be delivered up, and provided that "so much of the said bill as contains or relates to matters hereby referred to the master for a report, is retained for further decree in the premises." Two of the defendants in the suit to whom deeds of conveyance had been executed, whose deeds were set aside as fraudulent, appealed from this decree. The other defendants did not appeal. It was urged before the Supreme Court that the decree was not final. Chief Justice Taney said:

"Undoubtedly it is not final in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decree' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." Further on in the opinion he said: "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pur-

suant to the decree passed." It was accordingly held that the decree was a final one from which an appeal would lie.

Hinckley *vs.* Gilman, &c. Railroad Co., 94 U. S., 467, was a foreclosure suit. On April 8, 1876, a final decree was rendered in that suit. Hinckley having previously been appointed receiver therein. The mortgaged property was sold under the decree and thereafter, on the settlement of the receiver's accounts, he was found to be indebted in the sum of over $18,000 for which a decree was entered against him directing him to pay the sum so found against him into court by a certain day. From this decree he appealed. It was contended that he was not a party to the foreclosure suit, had no personal interest therein, and therefore could not prosecute an appeal. But Mr. Chief Justice Waite said:

"The receiver cannot, and does not, attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. To that
33 extent he has been subjected to the jurisdiction of the court and made liable to its orders and decrees. He has, therefore, the corresponding right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, although an officer of the court, and, after the final decree below, has the right to his appeal here. In this case the final decree has been given, and the case is properly here upon the appeal as prayed and allowed."

In Trustee *vs.* Greenough, 106 U. S., 527, the complainant, a holder of bonds of The Florida Railroad Company, filed a bill in equity on behalf of himself and the other bondholders against certain parties who, it was alleged, were illegally dissipating the property of the company. The complainant secured the relief he sought by a decree which took the management of the property out of the hands of the defendant trustees and put it into the hands of the agents appointed by the court. A great amount of property was thereby saved to the complainant and his co-bondholders. After this result had been secured, he filed a petition praying for the payment to him out of the funds of a sum sufficient to cover his expenses and for his personal services. The court made an order on this petition, allowing to the petitioner his expenses and a sum for personal services. From this order an appeal was taken. The objection was interposed that the order was not a final decree from which an appeal would lie. But Mr. Justice Bradley held that it was, saying:

"Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but under all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal."

In Brush Electric Co. *vs.* Electric Improvement Co., 51 Fed., 557, the California Electric Light Company and the San Jose Light and

Power Company commenced a suit in equity against the Electric Improvement Company, for an infringement of a certain patent and joined with them as a plaintiff the Brush Electric Company without that company's consent. After the bill of complaint had been filed in the Circuit Court the Brush Electric Company moved for a dismissal of the suit as to it. A hearing was had on affidavits introduced by the Brush Electric Company and the California Electric Light Company, bearing on the question of the right of the latter company to use the name of the Brush Electric Company in the suit.

The question of fact was considered and determined upon the
34 affidavits. Questions of law were also presented and decided.

The court by its order overruled the motion to dismiss. From this order the Brush Electric Company took an appeal to the Circuit Court of Appeals for the Ninth Circuit. That court held that the order should be deemed a final one from which an appeal would lie, saying that the matter presented for consideration was not one presented by the bill of complaint or sought to be determined by it. In speaking of final decisions, which determine all the questions raised on the face of the pleadings, it was said:

"Considering the construction given by the Supreme Court to the terms 'final decisions,' 'judgments,' or 'decrees,' we reach the conclusion that the term 'final decisions' in said statute (the Judiciary Act of 1891) under consideration, does not mean necessarily such decisions or decrees only which finally determine all the issues presented by the pleadings; that, while these are undoubtedly final decisions, the terms are not limited to them, but also apply to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles the controversy. * * * The order overruling the motion of the Brush Electric Company to dismiss the cause as to it, does seem to have been the final determination of a most important question, collateral in its character. In considering the motion, questions of fact and of law were involved. Distinct issues of both were presented. They were such as were not presented by the general issues in the case. These questions would not be again presented. They were not preliminary to the decree upon the merits, or involved in the decree upon the merits. The order determining the issues upon this motion we therefore hold was a 'final decision,' within the meaning of the statute concerning appeals in this court above referred to, and was therefore the subject of an appeal thereunder."

In McGourkey *vs.* Toledo & Ohio Railway, 146 U. S., 536, there is a review by Mr. Justice Brown of the preceding cases on the subject of what constitutes a final decree. This case, and the other cases above referred to, certainly make it clear that a decision in any particular proceeding which disposes of the whole matter litigated in that proceeding, and leaves nothing thereafter to be done except the ministerial act of executing it, is a final decree or final judgment in that proceeding, and one which may be reviewed on appeal or by writ of error.

In the case at bar, the order of the Circuit Court was to produce the books before the trial of the action at law as well as at trial. It

was made pursuant to the petition of the plaintiff in the prin-
35 cipal suit, who averred that the books contained evidence pertinent to the issue. The answer to the petition presented issue upon several questions of law. The proceeding thus instituted and carried on was one collateral to the principal suit, though in aid of it. There is but one defendant in the principal suit, and that is the Pennsylvania Railroad Company. In the collateral proceeding the defendants are the Pennsylvania Railroad Company and twelve other parties. It is those twelve other parties who have sued out the writ of error. The order of the Circuit Court is, in effect, one overruling the answer, which is an answer in the nature of a demurrer to the petition, and directing the defendants mentioned in the petition, other than the Pennsylvania Railroad Company, which company is not included in the order, to produce the books and papers not only on the trial of the action at law, but before the trial for the inspection of the counsel and agents of the plaintiff company.

We think this case is plainly distinguishable from Alexander *vs.* United States, 201 U. S., 117, in which the order appealed from was held to be an interlocutory order. There Alexander was directed by the court to appear before an examiner, in an equity suit, and produce certain books and answer the questions propounded to him by the complainant's counsel. He was a mere witness in the trial of the suit before the examiner. He was required, under Equity Rule 67, to answer all questions propounded to him. It was the duty of the examiner under that rule to take all the evidence, noting the objections thereto. Blease *vs.* Garlington, 92 U. S., 1.; Nelson *vs.* United States, 201 U. S., 92, 114. In every such case the customary rule is applicable that there is nothing from which a witness can appeal before he has been adjudged guilty of contempt. But in the case at bar the petitioner does not seek to secure evidence from a witness in the trial of the action at law, but to compel a discovery by the defendants in the collateral proceeding before the trial of the action at law. The procedure authorized by Section 724 is wholly statutory. It prescribes the penalty, and the only penalty, for non-production, which is judgment in the action at law against the defaulting party. No judgment of contempt can be rendered in such a case. Merchants' National Bank *vs.* State National Bank, Fed. Cas., No. 9,448, and 3 Cliff., 201.

We also think that the case of Logan *vs.* Pennsylvania Railroad Company, 132 Pa. St., 403, is distinguishable from the one now in hand. In that case an order was made requiring a party to an action at law to produce papers at the trial. The procedure was under the provisions of an act of the Legislature of Pennsylvania, approved February 27, 1798, which was evidently modeled upon section 15 of the Federal Judiciary Act of 1789 (now section 724 of the Revised Statutes). The order was made previous to the time fixed for trial and an appeal was taken from it. The Supreme
36 Court held that the order was merely interlocutory and therefore not one from which an appeal would lie. Inasmuch as the order in that case was to produce papers at the trial of the action, and not before the trial, it seems clear that the appellant should have

reserved his objections to the order until the time of trial. The rulings of the court then made would have been subject to exceptions and could have been reviewed on a writ of error bringing up the final judgment. The case is not an authority for dismissing the writ of error now before us.

Our conclusion on the motion to dismiss the writ of error is that, as the plaintiffs in error have been subjected to the jurisdiction of the Circuit Court, and made liable to its order in a proceeding collateral to and independent of the action at law, and as the order is a decision of all the matters involved in that proceeding and leaves nothing to be done except the ministerial act of executing it by producing the books of the defendant company, both before and at the trial of the action, it is, in so far as it requires production before the time of trial, a "final decision" reviewable on a writ of error.

We turn, then, to the consideration of the questions presented by the assignment of errors. The first of these questions is, Are the plaintiffs in error "parties" within the meaning of Section 724? In an action at law, if a corporation be a party, a discovery in aid of the action may be obtained by filing in chancery a bill against the corporation and its officers. The officers may be joined in the equity suit because the corporation can answer only under its seal, while the officers are required to answer under oath. In the present case the petitioner has sought to invoke that practice. The argument on behalf of the petitioners is that the officers of the corporation are required to produce its books not as individuals but as representatives of the corporation. But Section 724 does not authorize such practice. The language is that the Federal courts may require "the parties," that is, the parties to an action at law, to produce books or writings at the trial of the action. In Rose *vs.* King, 5 S. & R., 241, the Supreme Court of Pennsylvania, dealing with an order made under the Pennsylvania statute above referred to, declared that there was no power under that statute to require a third person, not a party to the record of the case, to produce books or papers at the trial of the action. In construing Section 724 of the Federal Statutes, the same rule was followed in Ridgley *vs.* Richard, 130 Fed., 387. As the plaintiffs in error in the present case are not parties to the action at law, their failure to obey the order directed to them could furnish no warrant for awarding judgment by default against the defendant in that action. The order is therefore void, and for this reason must be reversed.

This point, however, relates merely to a technical defect in the procedure that may be corrected by an application to the
37 Circuit Court for a new order directed to the defendant company, and not to its officers. If a new order be applied for, and the defendant be required to produce its books for the inspection of the plaintiff's agents before the trial of the action, another writ of error may be taken to bring up that order and thus the trial of the action may be greatly delayed. We have therefore considered the second question, fully argued by counsel, which is, Has the Circuit Court the power, under Section 724, to order a party to produce its books or papers before the time of trial? The decisions of the Cir-

cuit Courts are divided on the question, the larger number doubtless being in favor of the exercise of the power. The section is substantially in the same form as when it was first enacted as section 15 of the Judiciary Act of 1789. In 1789, the parties to an action at law were not admissible as witnesses and did not become so in our Federal Courts until 1864, when Section 858 of the Revised Statutes was first enacted. By the old practice, a party in an action at law might give notice to his adversary to produce at the trial any document containing evidence pertinent to the issue, shown to be in his adversary's possession, and, if it were not produced, might give, if he were able to do so, secondary evidence of its contents. There was no difference in this respect between civil and original actions. Attorney General *vs.* Le Merchant, decided in 1779, and King *vs.* Watson, decided in 1788, 2 T. R., 201. The party receiving such notice could not be compelled to produce, and was not liable to punishment if he failed to produce. The only consequence of failure to produce was that secondary evidence, if available could be admitted. But if a party in an action at law, desired to prove at the trial the contents of documents in the possession of his adversary, and was not able to produce secondary evidence of those contents, then he could file in chancery a bill against his adversary to compel him to disclose those contents under oath, either by answer setting forth the contents in full, as was the earlier practice, or, as was the later practice, by appending to his answer a schedule containing a specific description of the documents in his possession, the discovery of the contents of which was sought. In the latter case an order could be secured from the Chancellor requiring the defendant to leave the documents with a designated officer for the inspection of the complainant. In Crowley *vs.* Perkins, 5 Sim., 552, decided in 1852, the defendant to a bill for discovery in aid of an action at law was ordered to produce at the trial of the action at law certain documents, which in his answer he admitted were in his possession. This order, however, was declared in Brown *vs.* Thornton, 1 Myl. & C., 243, to have been without authority. In the latter case, the court held that, on a pur- bill for discovery in aid of an action at law, all the court of chancery can do is to compel the discovery, that the proceeding ends when the discovery is made, that no decree is entered thereon, that the defend-
38 ant is then entitled to his costs, and that the complainant, having obtained the discovery, is left to make the best use of it that may be permitted by the court having jurisdiction of the action at law. In a case in chancery where a bill is filed for equitable relief, and also for discovery in aid of that relief, the Chancellor has always had the power, subject to certain exceptions not now necessary to be mentioned, to order documents in the possession of one of the parties to be produced on final hearing, or before the examiner who takes the evidence for final hearing, or even at any time after the filing of an answer. 3 Dan. Chan. Pl. & Pr. (1st Am. Ed.) 2064; Utah Const. Co. *vs.* Montana R. Co., 145 Fed., 981; Herbert *vs.* Dean & Chapter of Westminster, 1 P. Williams, 773; Bettison *vs.* Farrington, 3 P. Williams, 363.

It is to be observed, then, that previous to 1789, a discovery by a

party to an action at law could have been obtained only by the filing of a bill in chancery. That court had the power, in every such case, and also in every case for discovery and full relief in chancery, to compel the production of documents. On a pure bill for discovery in aid of an action at law, the power was exhausted when the documents were produced and the discovery made. On a bill for discovery and relief, the documents might be required to be produced either before or at the final hearing. The commentaries of Sir William Blackstone appeared a few years previous to 1789. That learned expounder of the principles of the common law (3 Black. Comm., 382) in speaking of defects in the trials of actions at law, mentioned, first, the want of a complete discovery by the oath of the parties, saying:

"It seems the height of judicial absurdity that in the same cause, between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster Hall, and denied on the other; or that the judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar; but, when sitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it." The second defect mentioned by him was stated in these words: "A second defect is of the nature somewhat similar to the first—the want of a compulsive power for the production of books and papers belonging to the parties. In the hands of third persons they can generally be obtained by rule of court, or by adding a clause of requisition to the writ of subpœna, which is then called a *subpœna duces tecum*. But, in mercantile transactions especially, the sight of the party's own books is frequently decisive; as the day-book of a trader, where the transaction was recently entered as really understood at the time, though subsequent events may tempt him to give it a differ-
39 ent color. And, as this evidence may be finally obtained, and produced on a trial at law, by the circuitous course of filing a bill in equity, the want of an original power for the same purposes in the courts of law is liable to the same observations as were made on the preceding article."

The author of the Judiciary Act of 1789 is supposed to have been Oliver Ellsworth. Virginia *vs.* Rives, 100 U. S., 313, 358. That he was influenced by these criticisms of Blackstone in embodying in that act powers theretofore exercised only by the Chancellor, seems very probable from the following excerpt from Maclay's Journal (p. 92) concerning the procedure before the United States Senate when that body, sitting as a Committee of the Whole, were considering the act: "Up now rose Ellsworth, and in a most elaborate harangue supported the clause (the clause requiring a defendant on oath to disclose his knowledge of the case, which was subsequently stricken out), now in chancery, now in common law, and now common law again with a chancery side. He brought forward Judge Blackstone and read much out of him. Patterson rose in reply and followed him through these thorny paths I thought, with good success. He showed, justly enough,

that Blackstone cut both ways, and nothing could be inferred from him but his ridiculing the diversity of practice between chancery practice and that of the common law." But whatever influence may have led to the framing of Section 15 of the original Judiciary Act, the question now presented is whether it was the object of that section to give a complete or only a partial substitute for the chancery proceeding. It seems to have been the first statutory provision in England or in this country, extending to courts of law the power of a court of chancery to compel a party to produce documents. In some of our states similar legislation was soon adopted, but it was sixty-two years before any such power was given to the courts of law in England. 1 Thomp. on Trials, sec. 731. The section authorizes the Federal Courts to make orders for the production of books or writings, not "in actions at law," not "in proceedings in action at law," but "in the trial of actions at law." Bearing in mind that a court of chancery had the power to require a party to produce books or writings in a case in which that court was called on to administer relief as well as to compel discovery, either before or at the final hearing, the language of the section now under review seems to be restrictive. One of the first cases in which it came before a court for consideration was Bas *vs.* Steele, 3 Wash. C. C., 381, and Fed. Cas. No. 1,058. In that case Mr. Justice Washington, sitting in circuit for the district of Pennsylvania, in 1818, after considering other questions said:

"The remaining point is important and novel, and has not yet been decided in the Supreme Court, in this court or in any other
40 Circuit Court, so far as we are informed. It is not difficult to give a construction to the section of the act of Congress. When either party wants papers, he must give notice; and he has in view one of these objects: 1st. That if the papers called for are not produced, he may be enabled to argue against the party not producing them to the jury; 2d. This object may be to obtain evidence from the contents of the papers called for, and; 3d. To move the court for a non-suit, or for a judgment by default, as the case may be. But in either case, the party must entitle himself to the benefits of the section by showing that the party was in possession of the papers called for; and he must also give evidence of the contents of the papers; for it will not do for him only to say what those contents are. The court will require reasonable proof of the possession, and of the pertinency of the papers. If the object of the party is to avail himself of the provisions of the section, so as to move for a non-suit, or for judgment by default, he must put the party on his guard and let him know the consequences of a refusal, and the party receiving such notice will come prepared to meet it. In any such case, when the party is called on to produce papers, he may make oath that he has them not, and thus extricate himself from difficulty. This is the case in chancery, where the plaintiff charges the defendant with having papers to which he has a right, and the defendant relieves himself by his oath; and this may be met by contrary proof of two witnesses. In every case, the party claiming the papers must give evidence of the relevancy of the papers, and of the opposite party

having possession of them. Whenever a judgment by default, or a non-suit, is intended to be claimed, the notice to produce papers must give the party information that it is intended to move for a non-suit, or a judgment by default, as the case may be; and this must hereafter be considered as the rule of the court under this section of the Act of Congress."

In Dunham *vs.* Riley, 4 Wash. C. C., 126, and Fed. Cas. No. 4,155, Mr. Justice Washington, in 1821, followed Bas *vs.* Steele, and added that the court did not in that case decide whether the order to produce papers should be absolute in the first instance. He said: "We think it need not be so, but that upon the rule to show cause it may be made *nisi*, leaving the court at liberty to enforce the rule, unless the plaintiff can show, at the trial, good cause for not producing them. If the rule be made absolute at the time when it is argued, the court might have to go prematurely into an inquiry into the case, in order to decide whether the order should be absolute or not. If the case should be simple, and such inquiry should not appear to be necessary, the court may at once discharge, or make the rule absolute."

41 In this case the argument was on a rule upon the plaintiff requiring him to show cause why he should not be required to produce certain books, papers and accounts at the trial of the action. Justice Washington granted a rule *nisi*.

In Iasigi *vs.* Brown, Fed. Cas. No. 6,993 and 1 Curt. 401, decided in 1853, Mr. Justice Curtis, sitting in circuit for the district of Massachusetts, said:

"By the common law, a notice to produce a paper merely enables the party to give parol evidence of its contents, if it be not produced. Its non-production has no other legal consequence. This act of Congress has attached to the non-production of a paper, ordered to be produced at the trial, the penalty of a non-suit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making such a case and obtaining such an order as the act contemplates. * * * The application for such an order may be made, on notice, before trial. There is manifest convenience in allowing this. But, at the same time, I think the court should not decide finally on the materiality of the paper, except during trial, because it would occupy time unnecessarily, and it might be very difficult to decide beforehand whether a paper was pertinent to the issue, and whether it was so connected with the case that a court of equity would compel its production. These points could ordinarily be decided without difficulty during a trial after the nature of the case and the posture and bearings of the evidence are seen."

It was further said in this case that the correct practice seems to be that, after the moving party has made a *prima facie* case for such an order, he shall enter an order *nisi*, leaving it for the other party to show cause at the trial.

As already stated, a number of cases may be cited in which orders to produce books or writings before trial were made. The most exhaustive review of the decisions on both sides of the question, con-

tained in any single case, is to be found in Bloede Co. *vs.* Bancroft & Sons Co., 98 Fed., 175. In that case, it was held that a Federal court may make an order to produce before the trial. In the opinion of the learned judge who decided that case, there is however, no reference to Bas *vs.* Steele or to Dunham *vs.* Riley. The penalty incurred by one who fails to produce books under an order made pursuant to Section 724 may be a judgment in the action against him. If the order be to produce at the trial, and the party against whom it is made fails to comply therewith, or, producing the
42 books, insists that they are not admissible, the ruling of the court awarding judgment against the defaulting party for non-production, or its ruling on the question of the admissibility of the books, may be the subject of a bill of exceptions and be reviewed on a writ of error bringing up the final judgment in the action. But if the order be to produce before trial, and the party against whom it is made defaults how can judgment of non suit or judgment by default be entered? A judgment must be founded on a record that will support it. An order to produce before the trial constitutes, at common law, no part of the record of the action, neither can it be excepted to. It is well settled practice in our Federal courts that the assignments of error in an action at law are founded only on the record of the case, and the bill of exceptions taken in the course of the trial. Storn *vs.* United States, 94 U. S., 76; Suydam *vs.* Williamson, 20 How. 453; New Orleans Railroad *vs.* Morgan, 10 Wall. 261; Insurance Co. *vs.* Piaggio, 16 Wall. 386. Originally, the record of an action at law consisted only of the process, pleadings, verdict and judgment, and the only errors reviewable on a writ of error were those apparent on the face of such a record. 3 Ency. Pl. & Pr. 378. By the statute of 13 Edw. 1, Chap. 31, authority was given to take bills of exceptions to the rulings of judges at trials, Bacon's Abridg. Tit. Bill of Exceptions; Bulkeley *vs.* Butler, 2 B. & C., 434, 444; Pomeroy's Lessee *vs.* Bank of Indiana, 1 Wall., 592, 599; Wheeler *vs.* Winn, 53 Pa. St., 122, 126. In some of our states, an order striking out pleadings before issue joined, and the like, may now, by statute, be incorporated in the record of an action at law so as to be reviewable on a writ of error. In New Jersey, where, as in the Federal courts, the common law practice prevails, it has been held that if a plea be struck out as sham or frivolous the order cannot be reviewed on a writ of error for the reason that it constitutes no part of the record. In Brown *vs.* Warden, 44 N. J. L., 177, the highest court of that State said:

"The right to overrule and surpress pleadings as sham and frivolous has existed in the superior courts of common law from time immemorial, and no attempt has ever been made before the present occasion to place such incidental orders for review before an appellate court."

The tenacity with which the Federal courts hold to the common law practice on writs of error is well illustrated by the cases of Campbell *vs.* Boyreau, 62 U. S., 224, and Andes *vs.* Slauson, 130 U. S., 435. And in Wright *vs.* Hollingsworth, 1 Pet., 168, it was said:

"The allowance and refusal of amendments in the pleadings, the granting or refusing new trials, and, indeed, most other
43 incidental orders made in the progress of a cause before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their rules and modes of practice. This, it is true, may occasionally lead to particular hardships; but, on the other hand, the general inconvenience of this court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable."

See also, *Ex parte* Crane, 5 Pet. 199; Evans *vs.* Stettnisch, 149 U. S. 607.

To what extent the statutory practice in some of our States of allowing interlocutory orders to be incorporated in the record of an action at law, and error to be assigned thereon, may be permitted in our Federal courts under the provisions of Section 914 of the Revised Statutes, it is not now necessary to decide; for no act of the Legislature of the State of Pennsylvania has been referred to, nor have we knowledge of any statute of that State, which provides that an order requiring a party in an action at law to produce books, for the inspection of his adversary before trial, may be incorporated in the record of the action, or that error may be assigned thereon. So far as we are aware, no such practice in the Courts of the State of Pennsylvania exists. And Congress has prescribed no such practice for the Federal courts. It seems clear, therefore, that if a party who is ordered to produce books before trial defaults, and a judgment is entered against him merely for that reason, the judgment would necessarily be reversed on error, for want of a record to support it. A construction of Section 724, which limits the power of the court to an order to produce books at the trial, leaves the party against whom the order is made in a position where he may take exceptions to the rulings of the court at the trial, requiring obedience to the order, or concerning the admissibility of the books, and thereby secure a record on which a writ of error will operate. But an order to produce before trial, if it be disobeyed, will be wholly nugatory for the reason that the penalty prescribed by the Section—the entry of judgment against the disobedient party—cannot be lawfully imposed. If this be not so, then an erroneous ruling of the court made at the trial upon an order to produce at the trial may be corrected by an appellate tribunal, while it cannot be in the case of an erroneous ruling concerning an order to produce before trial. A construction leading to such diverse results does violence to the language of the section which authorizes an order to produce only "in the trial of actions at law." We conclude, therefore, that Section 724 does not confer the power to require a party to produce books before trial.

If a party to an action at law desires inspection of books in
44 his adversary's possession before trial of the action, he is left to his chancery remedy by filing his bill for discovery.

The third question is: May the defendant in a civil action brought to recover damages for a violation of any of the provisions of the Interstate Commerce Act be required, under Section 724, to produce

its books even at the trial? It is insisted by the plaintiffs in error that this case falls within the operation of the general rule that equity will not compel a party to disclose facts which would tend to expose him to criminal punishment, or to penalties, fines or forfeitures, and that as no order requiring parties to produce books can be made under the authority of Section 724 except "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," the order now under review, even in so far as it requires production of books at the trial, is void. Section 8 of the Interstate Commerce Act provides that a common carrier violating any of its provisions

"shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel fee or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

And Section 10 provides that any common carrier that shall wilfully violate any of the provisions of the Act, or shall be guilty of any infraction of it, "shall be deemed guilty of a misdemeanor," and subject to a fine not exceeding five thousand dollars for each offense. If the books of a defendant will tend to prove a particular violation of the act in a civil case instituted under the authority of Section 8, they will also tend to prove the same violation in a criminal case founded on Section 10.

But a corporation is not a natural person. It is a creature of the State. It possesses no powers or franchises except those conferred upon it by the State. When it accepts its charter from the State it voluntarily subjects itself to all the obligations and duties constitutionally imposed upon it by the State. So when it engages in Interstate Commerce it is subject to all the regulative provisions concerning such commerce constitutionally prescribed by Congress. Whether it may not, in a case like the present one, be compelled to produce its books and papers at the trial of a civil action against it, even if such production shall disclose criminal acts by it, is a question that has not been argued. There is, also, in this connection, another question that has not been argued, and that is whether a corporation, in a case like this, may refuse to produce its books or papers because of the provisions of the Fourth Amendment
45 of the Constitution against unreasonable searches and seizures, or of the provision of the Fifth Amendment that no person shall be compelled to be a witness against himself. In Hale *vs.* Henkel, 201 U. S., 43, Fr. Mr. Justice Brown, at page 70, said:

"The question whether a corporation is a 'person' within the meaning of this (the Fifth) Amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees."

On pages 75 and 76 he said:

"Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with the violation of

a statute of the State of its creation, or of an Act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation; we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures."

On page 77, Mr. Justice Harlan declared that, in his opinion, a corporation is not embraced by the word "persons" in the Fourth Amendment. On pages 82 and 83 Mr. Justice McKenna leaves open the question whether a corporation can claim immunity under either the Fourth or the Fifth Amendment. And on page 88 Mr. Justice Brewer says that "the fact that a State corporation may engage in business which is within the general regulating power of the National Government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments." These varying expressions of opinion emphasize the impropriety of any expression of opinion by us, on the third question above stated, before counsel shall have given us the aid of full arguments thereon. Furthermore, the question is not now properly before us. Objections to an order to produce books at the trial should be made as in the case of a *subpœna duces tecum*, at the trial, when, as already shown, exceptions to the rulings of the trial court may be taken as the foundation of a writ of error bringing up the final judgment in the action.

The fourth question is: Is not the order of the Circuit Court void for failure to describe with sufficient definiteness the books and papers required to be produced? And the fifth and last question is: Is not the order erroneous because of the allegation of the defendant that its books have not been so kept as to show what rebates, drawbacks, compensation or concessions, it has allowed to the several parties named in the plaintiffs' petition? Neither of these
46 questions is now properly before us. Like the third question, they may perhaps be properly raised on an order directing the defendant corporation to produce its books at the trial of the action, but even in such case they can be raised only at the trial.

Having reached the conclusion above expressed, it follows that the motion to dismiss the writ of error must be denied, and that the judgment of the Circuit Court must be reversed with costs, and it is so ordered.

Filed, January 2, 1907.

In the United States Circuit Court of Appeals for the Third Circuit.

ALEXANDER J. CASSATT ET AL., Plaintiffs in Error,
vs.
MITCHELL COAL AND COKE COMPANY, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Dissenting Opinion.

BUFFINGTON, *J.:*

This court, in my judgment, has no jurisdiction on this writ of error. I therefore dissent. In the Circuit Court, the Mitchell Coal and Coke Company brought suit against the Pennsylvania Railroad Company, to recover damages for alleged violations of the Interstate Commerce Act. On petition of the Coal Company and in pursuance of alleged power under R. S. Sec. 724, that court, after hearing on answer made by the Pennsylvania Railroad Company alone (the plaintiffs in error making no answer or objection) ordered that certain books and records of that company be produced by its officers at the trial and also prior thereto at the Railroad Company's own office, for inspection and making copies thereof. This order the Railroad Company neither excepted to or appealed from. That such an order was interlocutory and not appealable is held in Logan *vs.* Pennsylvania R. R. Company, 132 Pa. St., 403, a decision adopted in Alexander *vs.* United States, 201 U. S., 122. To the entry of such order, however, the plaintiffs in error, who were the officers of the Railroad Company named in the order, excepted, as individuals and have removed to this court by writ of error the record in the case. Now these plaintiffs in error have no property in the books, being the mere custodians thereof as officers of the railroad; they made no answer in the proceedings below, their rights were not involved, considered or adjudicated and no disclosures are now sought from them. Indeed, as mere custodians of the books and papers in question as officers of the railroad, they bear an even more remote relation to the case below than did the plaintiffs in error in Nelson *vs.* The United States, 201 U. S., 115, of whom it was said: "These writs of error are not prosecuted by the parties in original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. Being witnesses merely it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issue between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal." Seeing then that these plaintiffs in error are not parties to the case between the Coal Company and the Railroad Company, they are not concerned in that controversy or affected by its disposition. It is clear that their controversy is wholly one between them and the sovereign power acting through one of its courts: Alexander *vs.* United States,

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supra, which court has ordered them, as officers of a third party, to produce certain books of such third party in their custody. And it is equally clear that that court has yet made no order against them in that regard which is final. The order to produce in no way affects their liberty, their property or their liability. It is no more final than a subpœna with a *duces tecum* clause directing them to produce documents in their possession would be. An attachment for contempt is requisite to constitute a final and appealable decree in case of a subpœna of that character: Alexander *vs.* United States *supra*. It is urged, however, that under R. S. Sec. 724, the Circuit Court cannot enforce its order to produce by an adjudication for contempt for non-production, and that because it cannot attach, an order to produce is the last order the court can make, and therefore, a final one. Not only is this a *non sequitur*, but that a Circuit Court is powerless to enforce by attachment for contempt, an order which by statute it is empowered to make, is a proposition I am not yet prepared to concede, if that question were before us. In that connection it suffices to say that if the construction placed on this statute by Mr. Justice Washington in Bas *vs.* Steele, 3 Wash. C. C. 381, Fed. Cas. 1088, be correct, namely, that the objects of the statute are not only to lay grounds for a judgment of default, but also "to obtain evidence from the contents of the papers called for," it may well be contended that the Circuit Court, under its general powers as a court, can by attachment compel production of that evidence which it was the object of the statute it should obtain. But assuming, for present purposes only, the court has no power to attach, it by no
48 means follows that the more order on such a custodian of papers as here to produce is a final decree simply because the court can do no more. Such order lacks all the elements of a final, reviewable decree. It subjects such custodian agent to no liability either in person or property; he is not concluded, affected or harmed by such order, it enters no judgment, default, lien or decree against him; it subjects him to no penalty and he is not aggrieved thereby. But apart from this, if the only power the court has under this statute is to enter a judgment by default, then the entry of such default and the liquidation of a judgment in the final decree, under the act which makes the case appealable, and then the appeal is by the party aggrieved and not by the mere custodian of such party's books and records. No judgment by default having been entered and liquidated, it follows that no final appealable decree was entered. To entertain this writ is to concede to a stranger to the controversy higher rights than the litigants themselves possess. Whether this order to produce is valid, whether it warrants a judgment by default against the defendant are matters in which these plaintiffs in error have no concern. If the court below finally entered judgment on default, in that case these questions could be properly subjected to review by the aggrieved party, the Pennsylvania Railroad. But in advance of that time these plaintiffs in error—whether they seek to do it as mere individuals or as officers of that company—cannot under cover of an alleged final decree in a mere order to produce, confer on this court by indirection a juris-

diction to review in a preliminary stage questions between the Coal and Railroad Companies which neither of said companies can have reviewed until final decree. For these reasons I would dismiss this writ of error for want of jurisdiction.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1906.

No. 6.

ALEXANDER J. CASSATT and Others, Plaintiffs in Error,
vs.
PENNSYLVANIA COAL AND COKE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

49 This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause, be, and the same is hereby reversed with costs.

Philadelphia, January 7, 1907.

GEO. GRAY,
Circuit Judge.

UNITED STATES OF AMERICA, *act:*

I, William H. Merrick, Clerk of the Circuit Court of Appeals, for the Third Circuit, do hereby certify that the foregoing pages, from 1 to 49 inclusive, *to* contain a full, true, complete and faithful copy of the original transcript of record in the case wherein, Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson and R. L. Head, are Plaintiffs in Error, and the Pennsylvania Coal and Coke Company is Defendant in Error, on file and now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this Eleventh day of February, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

50 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Alexander J. Cassatt, John B. Thayer, Charles E. Pugh *et al.*, are plaintiffs in error, and Pennsylvania Coal & Coke Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

51 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of April, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

52 [Endorsed:] File No. 20,671. Supreme Court of the United States. No. 706, October Term, 1906. Pennsylvania Coal & Coke Co. *vs.* A. J. Cassatt *et al.* Writ of Certiorari.

53 In the United States Circuit Court of Appeals for the Third Circuit.

PENNSYLVANIA COAL AND COKE COMPANY, Plaintiff in Error,
vs.
ALEXANDER J. CASSATT, JOHN B. THAYER, ET AL., Defendants in Error.

Stipulation.

And now, to wit, this 3rd day of May, 1907, it is hereby stipulated and agreed by and between George S. Graham, Esq., Attorney for the Plaintiff in Error in the above case, and John G. Johnson, Esq., Attorney for the Defendants in Error in the above case, that the copies of the transcript of record of the above case, certified by the Clerk of the said Circuit Court of Appeals for the Third Circuit, now in the Supreme Court of the United States, may be adopted and

used as the record of said case for all purposes in the said Supreme Court of the United States.

GEO. S. GRAHAM,
Attorney for Plaintiff in Error.
JOHN G. JOHNSON,
Attorney for Defendants in Error.

(Indorsed:) Circuit Court of Appeals for the Third Circuit. No. 6 Oct. Term 1906. Pennsylvania Coal and Coke Co., Plaintiff in Error, *vs.* Alexander J. Cassatt, John B. Thayer, *et al.*, Defendants in Error. Stipulation. Filed May 6, 1907.

54 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, by virtue of the foregoing Writ of Certiorari and in obedience thereto do hereby certify to the Supreme Court of the United States the consent of the Counsel for the respective parties thereto annexed as my return to the said writ.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this seventh day of May in the year of our Lord one thousand nine hundred and seven and of the Independence of the United States the one hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

55 [Endorsed:] 706, 20671. No. — —— Term, 190–. United States Circuit Court of Appeals, Third Circuit. Certified Copy.

56 [Endorsed:] File No. 20671. Supreme Court U. S. October Term, 1907. Term No. 284. Pennsylvania Coal and Coke Company, petitioner, *vs.* A. J. Cassatt *et al.* Writ of certiorari and return. Filed May 8", 1907.

Office Supreme Court, U. S.
FILED,
MAY 11 1907
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

TERM, 1907.—No. 283.

WEBSTER COAL AND COKE COMPANY,
Plaintiff in Certiorari,

vs.

ALEXANDER J. CASSATT AND O. HERS,
Defendants in Certiorari.

MOTION TO ADVANCE HEARING.

BENJAMIN S. HARMON,
DAVID L. KREBS,
GEORGE S. GRAHAM,
JOHN W. GRIGGS,
Counsel for Petitioner.

S. F. Hollingsworth Co., Printers and Law Stationers, N. Y.

In the Supreme Court of the United States,

TERM 1907. No. 705.

WEBSTER COAL AND COKE COMPANY,
Plaintiff in *Certiorari*,

vs.

ALEXANDER J. CASSATT and others,
Defendants in *Certiorari*.

The petition of the Webster Coal and Coke Company respectfully shows:

FIRST: That on the petition of said company, on April 29, 1907, a Writ of *Certiorari* was awarded to bring to the Supreme Court of the United States the judgment and transcript of the record and proceedings of the Circuit Court of Appeals for the Third Circuit in the case therein entitled

Alexander J. Cassatt *et al.*,
Plaintiffs in Error,
vs.
Webster Coal and Coke Company,
Defendant in Error,
October Term, 1906, No. 8.

to the end that the said case might be reviewed and determined by this Court as provided by law.

SECOND: That the judgment of the Circuit Court of Appeals for the Third Circuit brought up by said Writ of *Certiorari* reversed a certain order of the Circuit Court of the United States for the

Eastern District of Pennsylvania made on the 12th day of April, 1906, whereby it was ordered among other things that Alexander J. Cassat, President, and certain other officers of the Pennsylvania Railroad Company, the defendant in said suit, should produce and submit to examination by plaintiff, its agents, accountants and attorneys the daily distribution sheets made and kept by the defendant, the Pennsylvania Railroad Company, between the first day of May, 1902, and the first day of January, 1904, so that the plaintiff, the petitioner herein, might therefrom prepare tabulated statements showing the rated output capacity of the mines of the Berwind-White Coal Mining Company, the Keystone Coal and Coke Company, and of the Pennsylvania Coal and Coke Company; also the percentage of cars which said last mentioned companies were entitled to receive as fixed by the defendant company and contained and set forth on said daily distribution sheets; together with copies of all special orders issued at any time between the dates last above mentioned, ordering and directing the distribution of coal cars to the said last named coal companies, as in and by a copy of said order contained in the petition for the Writ of *Certiorari* in this case will more fully appear.

THIRD: That the suit of your petitioner, the Webster Coal and Coke Company vs. The Pennsylvania Railroad Company, in which the order last above mentioned was made, is now pending at issue in the Circuit Court of the United States for the Eastern District of Pennsylvania. That the purpose and object of said suit are particularly set forth in the petition for Writ of *Certiorari* in the above entitled cause to which for greater certainty reference is hereby made; that the object of said suit, briefly stated, is to recover damages suffered by your petitioner, the Webster Coal and Coke Company, by reason of unlawful acts of discrimination against it by the Pennsylvania Railroad Company in the allotment and distribution of coal cars for carrying the produce of the coal mines of your petitioner and of other coal companies and operators in the same region in the State of Pennsylvania for inter-state shipment; and for failure of the Pennsylvania Railroad Company to furnish to your petitioner the number of cars which they were entitled to receive upon the actual capacity of their mines and which cars the Pennsylvania Railroad Company had available for such purpose if it had not by gross favoritism diverted the cars to other favored shippers; Also for the recovery of dam-

ages for the unlawful, undue and unreasonable preference and advantage by the Pennsylvania Railroad Company to certain other coal companies by way of rebates upon freight charges for coal and coke shipped to points from within the State of Pennsylvania to points without the State of Pennsylvania; also for special rebates and drawbacks on coal and coke shipped in inter-state commerce allowed by the Pennsylvania Railroad Company to other shippers than your petitioner.

FOURTH: That the amount of damages claimed by your petitioner and believed to be recoverable by it from the Pennsylvania Railroad Company for the causes of action included in said suit amounts to more than $1,400,000.

FIFTH: That your petitioner, the plaintiff in said suit, cannot safely bring the cause to trial without an opportunity to examine before the trial the books, papers and documents referred to in the order of the said Circuit Court of the United States for the Eastern District of Pennsylvania. The questions raised and to be decided by this honorable Court comprise among others whether or not the action brought by your petitioner under authority of Section 8 of the Inter-State Commerce Act is a penal action; whether or not the Pennsylvania Railroad Company, the defendant therein, can take advantage of the immunity given to natural persons to withhold their books and papers from disclosure in penal actions; whether Section 724 of the Revised Statutes of the United States gives the right to demand inspection of books prior to the trial of a cause; and also whether the said Alexander J. Cassatt and other officers of the Pennsylvania Railroad Company had authority of law for appealing as individuals from the said order to produce books and papers made upon them in their capacity as officers and agents of the Pennsylvania Railroad Company; and whether the order of the Circuit Court of the United States for the Eastern District of Pennsylvania was a final order from which an appeal would lie to the Circuit Court of Appeals.

SIXTH: This case involves questions of practice and procedure of great importance, which should be authoritatively and finally adjudged by this honorable Court. Until those questions are so finally adjudged your petitioner's cause and other causes involving the same and similar questions and dependent upon the same course

of procedure will be suspended and delayed in trial; and it is respectively submitted that it is of great general concern that the important questions of legal practice involved in this case shall be determined as speedily as possible, in order that this class of legal claims arising under the Inter-State Commerce Act against transportation companies may be expedited, and obstacles to a fair and speedy trial be removed.

Wherefore, your petitioner prays that an order may be made directing that this cause be advanced on the docket for an early argument at October Term, 1907. And your petitioner will ever pray, etc.

WEBSTER COAL AND COKE COMPANY,
By
JOHN W. GRIGGS,
BENJAMIN S. HARMON,
Of Counsel.

STATE OF NEW YORK, }
County of New York, } ss:

BENJAMIN S. HARMON, being duly sworn according to law, doth depose and say that he is an attorney and counsel for the Webster Coal and Coke Company, the petitioner in the aforegoing petition and that the facts therein stated are true to the best of his knowledge, information and belief; and that, as attorney and counsellor for said petitioner, he is acquainted with the facts in said petition set forth and is authorized to make this affidavit on behalf of the petitioner.

BENJAMIN S. HARMON.

Sworn and subscribed to before me this 8th day of May, 1907.

THOMAS ROBINSON,
Notary Public,
New York County.

[redacted]

IN THE

Supreme Court of the United States

[redacted]

TERM, 1927.—No. [redacted]

[redacted]

vs.

[redacted]

MOTION TO ADVANCE [redacted]

In the Supreme Court of the United States,

TERM 1907. No. 706.

PENNSYLVANIA COAL AND COKE COMPANY,
Plaintiff in *Certiorari*,

vs.

ALEXANDER J. CASSATT and others,
Defendants in *Certiorari*.

The petition of the Pennsylvania Coal and Coke Company respectfully shows:

FIRST: That on the petition of said company on April 29th, 1907, a writ of *certiorari* was awarded to bring to the Supreme Court of the United States the judgment and transcript of the record and proceedings of the Circuit Court of Appeals for the Third Circuit in the case therein entitled

Alexander J. Cassatt *et al*,
Plaintiffs in Error,
vs.
Pennsylvania Coal and Coke Company,
Defendant in Error.
October Term 1906. No. 6,

to the end that the said case might be reviewed and determined by this court as provided by law.

SECOND: That the judgment of the Circuit Court of Appeals for the Third Circuit brought up by said Writ of *Certiorari* reversed a certain order of the Circuit Court of the United States for the

Eastern District of Pennsylvania made on the 12th day of April, 1906, whereby it was ordered among other things that Alexander J. Cassatt, President, and certain other officers of the Pennsylvania Railroad Company, the defendant in said suit, should produce and submit to examination by the plaintiff, its agents, accountants and attorneys the daily distribution sheets made and kept by the defendant, the Pennsylvania Railroad Company, between the first day of May, 1902, and the first day of January, 1904, so that the plaintiff, the petitioner herein, might therefrom prepare tabulated statements showing the rated output capacity of the mines of the Berwind-White Coal Mining Company, the Keystone Coal and Coke Company, and of the Pennsylvania Coal and Coke Company; also the percentage of cars which said last-mentioned companies were entitled to receive as fixed by the defendant company and contained and set forth on said daily distribution sheets; together with copies of all special orders issued at any time between the dates last above mentioned, ordering and directing the distribution of coal cars to the said last-named companies, as in and by a copy of said order contained in the petition for the Writ of *Certiorari* in this case will more fully appear.

THIRD: That the suit of your petitioner, the Pennsylvania Coal and Coke Company vs. The Pennsylvania Railroad Company, in which the order last above mentioned was made, is now pending at issue in the Circuit Court of the United States for the Eastern District of Pennsylvania. That the purpose and object of said suit are particularly set forth in the petition for Writ of *Certiorari* in the above-entitled cause to which for greater certainty reference is hereby made; that the object of said suit, briefly stated, is to recover damages suffered by your petitioner, the Pennsylvania Coal and Coke Company, by reason of unlawful acts of discrimination against it by the Pennsylvania Railroad Company in the allotment and distribution of coal cars for carrying the produce of the coal mines of your petitioner and of other coal companies and operators in the same region in the State of Pennsylvania for interstate shipment; and for failure of the Pennsylvania Railroad Company to furnish your petitioner the number of cars which they were entitled to receive upon the actual capacity of their mines and which cars the Pennsylvania Railroad Company had available for such purpose if it had not by gross

favoritism diverted the cars to other favored shippers; also for the recovery of damages for the unlawful, undue and unreasonable preference and advantage by the Pennsylvania Railroad Company to certain other coal companies by way of rebates upon freight charges for coal and coke shipped to points from within the State of Pennsylvania to points without the State of Pennsylvania; also for special rebates and drawbacks on coal and coke shipped in interstate commerce allowed by the Pennsylvania Railroad Company to other shippers than your petitioner.

FOURTH: That the amount of damages claimed by your petitioner and believed to be recoverable by it from the Pennsylvania Railroad Company for the causes of action included in said suit amounts to more than $400,000.

FIFTH: That your petitioner, the plaintiff in said suit, cannot safely bring the cause to trial without an opportunity to examine before the trial the books, papers and documents referred to in the order of the said Circuit Court of the United States for the Eastern District of Pennsylvania. The questions raised and to be decided by this honorable Court comprise among others whether or not the action brought by your petitioner under authority of Section 8 of the Inter-State Commerce Act is a penal action; whether or not the Pennsylvania Railroad Company, the defendant therein, can take advantage of the immunity given to natural persons to withhold their books and papers from disclosure in penal actions; whether Section 724 of the Revised Statutes of the United States gives the right to demand inspection of books prior to the trial of a cause; and also whether the said Alexander J. Cassatt and other officers of the Pennsylvania Railroad Company had authority of law for appealing as individuals from the said order to produce books and papers made upon them in their capacity as officers and agents of the Pennsylvania Railroad Company; and whether the order of the Circuit Court of the United States for the Eastern District of Pennsylvania was a final order from which an appeal would lie to the Circuit Court of Appeals.

SIXTH: This case involves questions of practice and procedure of great importance, which should be authoritatively and finally adjudged by this honorable Court. Until those questions are so finally adjudged your petitioner's cause and other causes involving

the same and similar questions and dependent upon the same course of procedure will be suspended and delayed in trial ; and it is respectfully submitted that it is of great general concern that the important questions of legal practice involved in this case shall be determined as speedily as possible, in order that this class of legal claims arising under the Inter-State Commerce Act against transportation companies may be expedited, and obstacle to a fair and speedy trial be removed.

WHEREFORE, your petitioner prays that an order may be made directing that this cause be advanced on the docket for an early argument at October Term, 1907. And your petitioner will ever pray, etc.

PENNSYLVANIA COAL AND COKE COMPANY,
By
JOHN W. GRIGGS,
BENJAMIN S. HARMON,
Of Counsel.

STATE OF NEW YORK, }
County of New York, } ss :

BENJAMIN S. HARMON, being duly sworn according to law, doth depose and say that he is an attorney and counsel for the Pennsylvania Coal and Coke Company, the petitioner in the aforegoing petition and that the facts therein stated are true to the best of his knowledge, information and belief ; and that, as attorney and counsel for said petitioner, he is acquainted with the facts in said petition set forth and is authorized to make this affidavit on behalf of the petitioner.

BENJAMIN S. HARMON.

Sworn and subscribed to before me this 8th day of May, 1907.

THOMAS ROBINSON,
Notary Public,
New York County.

Nos. [illegible]

283 & 284

IN THE

SUPREME COURT

OF THE UNITED STATES

Office Supreme Court, U. S.
FILED.
APR 20 1907
JAMES H. McKENNEY,
Clerk

Term, 1907

WEBSTER COAL and COKE COMPANY
Plaintiff in Error

vs.

A. J. CASSATT, JOHN R. THAYER, CHARLES E. PUGH, et al.
Defendants in Error

PENNSYLVANIA COAL and COKE COMPANY
Plaintiff in Error

vs.

A. J. CASSATT, JOHN R. THAYER, CHARLES E. PUGH, et al.
Defendants in Error

Term, 1907

PETITION FOR WRIT OF CERTIORARI

to Circuit Court of Appeals for Third Circuit

BENJAMIN S. HARRISON
DAVID L. KREBS
GEORGE S. GRAHAM
JOHN W. GRIGGS
Counsel for Petitioners

IN THE

Supreme Court of the United States

Term 1907. No.

WEBSTER COAL AND COKE COMPANY
Plaintiff in Error

vs.

ALEXANDER J. CASSATT, JOHN B. THAYER, CHARLES E. PUGH, W. W. ATTERBURY, MICHAEL TRUMP, R. M. PATTERSON, J. G. SEARLES, GEORGE W. CREIGHTON, WILLIAM W. STRONG, OSCAR A. KNIPE, WILLIAM J. BINGHAM, A. E. FITLER, WILLIAM A. THOMPSON, CHARLES R. STRONG, CHARLES KINGSMORE, A. D. ROBERTSON AND R. L. HEAD
Defendants in Error

Term 1907. No.

PENNSYLVANIA COAL AND COKE COMPANY
Plaintiff in Error.

vs.

ALEXANDER J. CASSATT, JOHN B. THAYER, CHARLES E. PUGH, W. W. ATTERBURY, MICHAEL TRUMP, R. M. PATTERSON, J. G. SEARLES, GEORGE W. CREIGHTON, WILLIAM W. STRONG, OSCAR A. KNIPE, WILLIAM J. BINGHAM, A. E. FITLER, WILLIAM A. THOMPSON, CHARLES R. STRONG, CHARLES KINGSMORE, A. D. ROBERTSON AND R. L. HEAD
Defendants in Error

PETITION FOR WRITS OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASES OF ALEXANDER J. CASSATT, ET AL., PLAINTIFFS IN ERROR, *vs.* WEBSTER COAL AND COKE COMPANY, DEFENDANT IN ERROR, No. 8, OCTOBER TERM, 1906, AND ALEXANDER J. CASSATT, ET AL., PLAINTIFFS IN ERROR, *vs.* PENNSYLVANIA COAL AND COKE COMPANY, DEFENDANT IN ERROR, No. 6, OCTOBER TERM, 1906

To the Honorable the Supreme Court of the United States:

The petition of the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company respectfully shows:

First.—That the Webster Coal and Coke Company is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and from October 1st, 1901, to September 1st, 1903, was the owner of large bodies of bituminous coal lands in the Counties of Cambria, Blair and Indiana, State of Pennsylvania, and during said time was engaged in the business of mining, producing, selling and shipping coal and coke thereon and therefrom.

Second.—That the Pennsylvania Coal and Coke Company is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and from May 1st, 1902, has been and now is the owner of large bodies of bituminous coal lands in the Counties of Cambria, Blair and Indiana, State of Pennsylvania, and had been since May 1st, 1902, and now is engaged in the business of mining, producing, selling and shipping coal and coke thereon and therefrom.

Third.—That the Pennsylvania Railroad Company is a corporation of the State of Pennsylvania, having its prin-

cipal office in the City of Philadelphia in said State and is a common carrier engaged in the transportation of passengers and property both wholly by railroad and partly by railroad and partly by water, under a common control, management or arrangement for a continuous carriage or shipment from within the State of Pennsylvania to other States of the United States and to foreign countries, and is subject to the provisions of the Acts of Congress of February 4th, 1887, entitled, "An Act to Regulate Commerce" and the various amendments thereto.

Fourth.—That the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company have shipped a great many thousand tons of coal from their mines above mentioned over the Pennsylvania Railroad to points in other states and outside of the State of Pennsylvania, the said carriage of the said coal by the railroad company being interstate commerce, and the said Pennsylvania Railroad Company having full control and management of the transportation of the said coal and coke for a continuous passage from the mines of the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company within the State of Pennsylvania to points of destination outside of the State of Pennsylvania and within the boundaries of other states of the United States. The said mines and bituminous coal lands of the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company are situated along the lines of the Pennsylvania Railroad Company and such lines, during the periods embraced in the complaints in these actions, formed the only outlet for the coal and coke of the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company to points in other states of the United States and outside of the State of Pennsylvania.

Fifth.—That there were and are other miners and shippers of bituminous coal along the lines of the Pennsylvania Railroad Company as well as the Webster Coal and

Coke Company and the Pennsylvania Coal and Coke Company, among them being the Berwind-White Coal Mining Company, the Keystone Coal and Coke Company, the Altoona Coal and Coke Company and the Glen White Coal and Coke Company.

Sixth.—That for a great number of years last passed it has been the practice of the said Pennsylvania Railroad Company to unjustly and unlawfully discriminate in favor of a favored shipper or shippers against another shipper or shippers who did not enjoy the favor of the said Pennsylvania Railroad Company or its officials. Among the favored class of shippers were the Berwind-White Coal Mining Company, the Keystone Coal and Coke Company, the Altoona Coal and Coke Company and the Glen White Coal and Coke Company. Among those not favored and those unjustly and unlawfully discriminated against were the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company.

That the said Pennsylvania Railroad Company during the period from October 1st, 1901, to September 1st, 1903, as to the Webster Coal and Coke Company, and from May 1st, 1902, to January 1st, 1904, as to the Pennsylvania Coal and Coke Company, assumed the right to estimate and determine the capacity to produce coal from the mines of the said two last mentioned companies, and did, in fact, estimate and fix upon what it declared and published to be the capacity of the mines of the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company as well as the capacity of the mines of the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company and other shippers of coal along its said lines of railroad. That upon this arbitrary basis of rating of capacity it estimated and fixed the percentage of coal cars which it daily allowed the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company out of the total number of cars which were daily distributed by the said Penn-

sylvania Railroad Company along its said lines for the transportation of coal. That the actual capacity of the mines of the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company during the said periods was at all times much greater than that estimated and fixed by the said Pennsylvania Railroad Company and upon the basis of which rating the said Pennsylvania Railroad Company actually distributed its cars. That at all times during the said periods—that is to say, from October 1st, 1901, to September 1st, 1903, as to the Webster Coal and Coke Company, and from May 1st, 1902, to January 1st, 1904, as to the Pennsylvania Coal and Coke Company, the said Pennsylvania Railroad Company's lines of railroad formed the only outlet to market for the said two last mentioned coal companies' coal for interstate shipment and the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company constantly during the said periods had orders for their coal largely in excess of the output per diem allotted and fixed by the said Pennsylvania Railroad Company and largely in excess of the carrying capacity of the cars distributed to the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company for that purpose; that during all of the said periods the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company repeatedly demanded from the said Pennsylvania Railroad Company cars for the transportation of the coal which the said coal companies were able and ready to mine and ship from their mines in excess of that actually shipped by them and for which they had a market without the State of Pennsylvania and within the boundaries of other states of the United States and which would have entered into and formed a part of the interstate commerce of the country, but that the said Pennsylvania Railroad Company unjustly and unreasonably neglected and refused to furnish the said coal companies with the number of cars which they were entitled to receive upon the actual capacity of their mines and which

cars the said Pennsylvania Railroad Company had available for such purpose, if the said Pennsylvania Railroad Company had not by gross favoritism diverted the cars to other favored shippers, as will hereafter appear. That the said Pennsylvania Railroad Company subjected the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company to undue and unreasonable prejudice and disadvantage by giving to other and favored shippers in the same region cars which would have gone to the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company had the same been distributed by the Pennsylvania Railroad Company upon the basis of the productive capacity of their mines as compared with the productive capacity of the mines of such other favored shippers. That the two most conspicuous examples of gross favoritism in the matter of the distribution of cars were the Berwind-White Coal Mining Company and the Keystone Coal and Coke Company. That the said Pennsylvania Railroad Company during the said periods issued orders directing that cars to the number of five hundred, or thereabouts, daily should first be given to the said Berwind-White Coal Mining Company before any distribution of cars was made to the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company, and actually transferred the title to or control of a large number of its cars to said Berwind-White Coal Mining Company and the said Keystone Coal and Coke Company, thus decreasing the supply of cars which the said Pennsylvania Railroad Company had available for distribution to the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company for the shipment of their coal then ready and offered for shipment. Other instances of undue preference and advantage given by the said Pennsylvania Railroad Company to the Berwind-White Coal Mining Company and the said Keystone Coal and Coke Company as well as some other shippers were, by preferring the last-named coal companies in the distribution of cars belonging to other railroad

companies and temporarily on the lines or under the control of the said Pennsylvania Railroad Company; by preferring the said Berwind-White Coal Mining Company and the said Keystone Coal and Coke Company and other shippers in the distribution and allotment of cars intended for the fuel supply of said Pennsylvania Railroad Company, in that the said Pennsylvania Railroad Company excluded such cars from the rated allotment of said shippers; by hauling the cars belonging to said Berwind-White Coal Mining Company and the said Keystone Coal and Coke Company to market when loaded and returning the same as empties with much greater expedition than that which the cars allotted to the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company were moved.

That another form of gross favoritism which resulted in injury to the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company during the said periods above mentioned and which constituted an undue and an unreasonable preference and advantage to the companies receiving the same, was the allowance of rebates upon all coal and coke shipped to points from within the State of Pennsylvania to points without the State of Pennsylvania and within the boundaries of other States of the United States, by the Altoona Coal and Coke Company and the Glen White Coal and Coke Company.

That during the periods from October 1st, 1901, to September 1st, 1903, as to the Webster Coal and Coke Company, and from September 1st, 1903, to November 4th, 1904, as to the Pennsylvania Coal and Coke Company, the said Pennsylvania Railroad Company, without the knowledge or consent of the said Webster Coal and Coke Company or the said Pennsylvania Coal and Coke Company, allowed and paid during all the time covered by the two above mentioned periods to the said Altoona Coal and Coke Company and the said Glen White Coal and Coke Company, respectively, a special rebate or drawback of 15 cents per ton on all of the coal and coke which the said Altoona

Coal and Coke Company and the said Glen White Coal and Coke Company hauled from their said collieries and delivered to the said Pennsylvania Railroad Company for interstate shipment. That the said Webster Coal and Coke Company from October 1st, 1901, until September 1st, 1903, and the said Pennsylvania Coal and Coke Company from September 1st, 1903, to November 4th, 1904, owned, among others, the Gallitzin Colliery. The Gallitzin Colliery had, like the Altoona Coal and Coke Company and the Glen White Coal and Coke Company, a short line of railroad from the colliery to the railroad junction. That the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company during their respective ownership of the said Gallitzin Colliery hauled the coal and coke from the colliery and delivered it to the Pennsylvania Railroad Company in exactly the same manner as the Altoona Coal and Coke Company and the Glen White Coal and Coke Company delivered their coal and coke, but while the Altoona Coal and Coke Company and the Glen White Coal and Coke Company received 15 cents per ton as a special rebate or drawback, the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company received no rebate or drawback whatever. That all of the said coal and coke mined, produced, sold and shipped to points outside of the State of Pennsylvania, but within the boundaries of other States of the United States, by the Altoona Coal and Coke Company and the Glen White Coal and Coke Company, and from the Gallitzin Colliery of the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company, in so far as any claim is made therefor were sent to the same general markets; and the said Pennsylvania Railroad Company in the transportation of all of said coal and coke did for the said Webster Coal and Coke Company and the said Pennsylvania Coal and Coke Company, during their respective periods, and for the said Altoona Coal and Coke Company and the Glen White Coal and Coke Company, like and contemporaneous ser-

vices in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Seventh.—That the Webster Coal and Coke Company brought suit against the Pennsylvania Railroad Company and issued a summons out of the Circuit Court of the United States for the Eastern District of Pennsylvania to No. 73, October Sessions, 1904, and filed a bill of complaint or statement of claim in the said case on the 24th day of January, 1905, wherein and whereby the said Webster Coal and Coke Company claimed the sum of one million three hundred and ninety-two thousand six hundred and ninety-five dollars ($1,392,695), damages for unjust, unreasonable and unlawful discrimination in the distribution of cars and other unlawful acts in connection with the movement of cars in the transportation of coal and coke from points at the mines of the said Webster Coal and Coke Company within the State of Pennsylvania to points without the State of Pennsylvania and within the boundaries of other States of the United States. In the said bill of complaint or statement of claim a second and additional cause of action is set forth for the recovery of ninety-one thousand, one hundred and forty-three dollars ($91,143.), on account of the secret, unjust, unreasonable and unlawful rebates or drawbacks of 15 cents per ton allowed and paid by the Pennsylvania Railroad Company on all coal and coke shipped for interstate commerce by the Altoona Coal and Coke Company and the Glen White Coal and Coke Company and not allowed or paid to the said Webster Coal and Coke Company.

Eighth.—That the Pennsylvania Coal and Coke Company brought suit against the Pennsylvania Railroad Company and issued a summons out of the Circuit Court of the United States for the Eastern District of Pennsylvania to No. 74, October Sessions, 1904, and filed a bill of complaint or statement of claim in the said case on the 24th day of January, 1905, wherein and whereby the said Pennsylvania

Coal and Coke Company claimed the sum of three hundred and eighty-two thousand, nine hundred and sixty-five dollars and nine cents ($382,965.09), damages for unjust, unreasonable and unlawful discrimination in the distribution of cars and other unlawful acts in connection with the movements of cars in the transportation of coal and coke from points at the mines of the said Pennsylvania Coal and Coke Company within the State of Pennsylvania, to points without the State of Pennsylvania and within the boundaries of other States of the United States. In the said bill of complaint or statement of claim, a second cause of action is set forth for the recovery of thirty-seven thousand, two hundred and nine dollars and fifteen cents ($37,209.15), on account of the secret, unjust, unreasonable and unlawful rebates or drawbacks of 15 cents per ton allowed and paid by the Pennsylvania Railroad Company on all coal and coke shipped for interstate commerce by the Altoona Coal and Coke Company and the Glen White Coal and Coke Company, and not allowed or paid to the Pennsylvania Coal and Coke Company.

Ninth.—That in each of the above cases the Pennsylvania Railroad Company, the defendant, entered pleas of "Not Guilty."

Tenth.—That the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company each filed in their respective cases in which each was and is plaintiff in the Circuit Court, a motion supported by an affidavit for an order on the Pennsylvania Railroad Company, defendant in each case, to show cause why the defendant should not produce books or writings in its possession or power which contained evidence pertinent to the issue and to permit the said plaintiffs, respectively, to examine the said books at a convenient time before trial. The application was made under Section 724 of the Revised Statutes, which reads as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If the plaintiff fails to comply with such order the court may, on motion, give the like judgment for the defendant as in cases of non-suit, and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

Answers were filed to the said petitions by the said Pennsylvania Railroad Company, the defendant in both cases. After argument had upon the petitions and answers in both cases, the Circuit Court, on the 12th day of April, 1906, decided that the prayer of the petitioners in both cases be granted and decreed, among other things, that

"Alexander J. Cassatt, President; John B. Thayer, Fourth Vice-President, head of the Traffic Department; Charles E. Pugh, Second Vice-President, head of Transportation Department; W. W. Atterbury, General Manager; Michael Trump, General Superintendent of Transportation; R. M. Patterson, Superintendent of Freight Transportation; J. G. Searles, Coal Freight Agent; George W. Creighton, General Superintendent; William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, R. L. Head, agents and employees of the Pennsylvania Railroad Company, defendant, shall produce and submit to the examination by the plaintiff, its agents, accountants and attorneys, the 'Daily Distribution Sheets,' made and kept by the defendant, between the 1st day of May, A. D. 1902, and the 1st day of

January, A. D. 1904, both days included, so that the plaintiff may therefrom prepare tabulated statements showing the rated output capacity of the mines of the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, and of the Pennsylvania Coal and Coke Company.

Also the percentage of cars to which the said Berwind-White Coal Mining Company and Keystone Coal and Coke Company, and the plaintiff, the Pennsylvania Coal and Coke Company, each were entitled to receive, as fixed by the defendant company, and contained and set forth on said daily distribution sheets, the whole number of cars daily allotted to the Mountain Division, the Cambria and Clearfield Division, the South Fork and Scalp Level Branch or Division, the Pennsylvania & Northwestern Division, and the Tyrone & Clearfield Division of the Pennsylvania Railroad Company, and the whole number allotted daily to the said Berwind-White Coal Mining Company, the Keystone Coal & Coke Company and the said plaintiff, the Pennsylvania Coal and Coke Company, over and from said several divisions. And it is further ordered and decreed that the aforesaid officers, agents and employes of the Pennsylvania Railroad Company shall produce and submit to the inspection of and to make copies of all special orders issued at any time between the 1st day of May, A. D. 1902, and the 1st day of January, A. D. 1904, and which were in force and effect between said dates, although made prior to said 1st day of May, A. D. 1902, ordering and directing the distribution of coal cars to the said Berwind-White Coal Mining Company, the Keystone Coal and Coke Company, or any other miners and shippers of coal from any of said several divisions or branches of defendant's railroad, especially the order giving, granting and distributing to the Berwind-White Coal Mining Company five hundred coal cars each day.

The production of said daily distribution sheets and other papers, and the said inspection and examination and preparation of said statements and copies to be made at the office or rooms of the defendant company, at Broad Street Station, Philadelphia, Pa., to begin on the 16th day of April, A. D. 1906, and to continue from day to day until fully completed. The defendant may be represented by its agent or agents or attorney as it may desire.

BY THE COURT."

This decree was entered in the Pennsylvania Coal and Coke Company's case. The language of the decree in the Webster Coal and Coke Company's case is similar, except that the time is from October 1st, 1901, to September 1st, 1903.

Eleventh.—That subsequently, on the 14th day of April, 1906, Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson and R. L. Head *as individuals*, sued out writs of error in both cases to the United States Circuit Court of Appeals for the Third Circuit, without making any answer or doing any matter or thing in the Circuit Court after the decree of the Circuit Court ordering the production of the books and papers, as above described, was served upon them. A certified transcript of the record was filed in the United States Circuit Court of Appeals in the Webster Coal and Coke Company's case as of No. 8, October Term, 1906, and as to the Pennsylvania Coal and Coke Company's case No. 6, October Term, 1906, and the assignments of error in each of the two cases were as follows:

"1. The Circuit Court erred in entering the order and decree of April 12, 1906, requiring the plaintiffs

in error to submit to the inspection of the plaintiff, and its counsel, prior to the trial of the said cause, the books, records and papers referred to in said order.

"2. The Circuit Court erred in entering the order and decree of April 12, 1906, requiring the plaintiffs in error to produce at the trial of the cause the books, records and papers referred to in the said order.

(Signed) "JOHN G. JOHNSON,
"*Attorney for Plaintiffs in Error.*"

Twelfth.—Argument was had in the Circuit Court of Appeals for the Third District on the writ of error taken by Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson and R. L. Head *as individuals*, plaintiffs in error, and the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company, respectively, as defendants in error, the cases being separate and having separate numbers, on the 4th day of October, 1906, before the Honorable Judges GRAY and BUFFINGTON, Circuit Court Judges, and the Honorable Judge LANNING, District Judge for the United States District Court of New Jersey, who was sitting with the two Circuit Court Judges above mentioned, to hear these cases. At the same time that these above mentioned cases were argued a similar question was argued in the case of Mitchell Coal and Coke Company *vs.* the Pennsylvania Railroad Company. In this case, to wit, the Mitchell Coal and Coke Company's case, the action was brought by parties not interested in the Webster Coal and Coke Company's case or the Pennsylvania Coal and Coke Company's case, and there was and is no connection between the cases by reason of any monetary or other interests in the cases. The Mitchell Coal and Coke Company's case, however, did pre-

sent a question for the Circuit Court of Appeals similar to that raised by the appeal in the Webster Coal and Coke Company's case and the Pennsylvania Coal and Coke Company's case, and the Circuit Court of Appeals in deciding all three cases, which they did on the 2nd day of January, 1907, filed a majority and a minority opinion in the Mitchell Coal and Coke Company's case, and made the majority opinion cover and determine the questions presented in the Webster Coal and Coke Company's case and the Pennsylvania Coal and Coke Company's case; and as a result of the majority opinion filed in the said Mitchell Coal and Coke Company's case, the decrees of the Circuit Court in the Webster Coal and Coke Company's case and the Pennsylvania Coal and Coke Company's case were reversed with costs. The opinions in each of the cases were *per curiam* and as follows:

> "The record of this case is similar to that in Alexander J. Cassatt, *et al.*, plaintiffs in error, *vs.* Mitchell Coal and Coke Company, defendant in error, decided at this term. The same questions of law are presented. The opinion in that case controls the decision of this. The motion to dismiss the writ of error is denied and the judgment of the Circuit Court is reversed with costs."

A certified copy of the entire record of both cases, to wit, the case of Alexander J. Cassatt, *et al.*, plaintiffs in error, *vs.* the Webster Coal and Coke Company, defendant in error, and the case of Alexander J. Cassatt, *et al.*, plaintiffs in error, *vs.* the Pennsylvania Coal and Coke Company, defendant in error, in the Circuit Court of Appeals for the Third Circuit, and certified copies of both opinions in the case of Alexander J. Cassatt, *et al.*, *vs.* Mitchell Coal and Coke Company as well as a certified copy of the entire record of the principal cases in the Circuit Court, to wit, the Webster Coal and Coke Company *vs.* the Pennsylvania Railroad Company, and the Pennsylvania Coal and Coke Company *vs.*

the Pennsylvania Railroad Company, are hereto annexed as part of this application in conformity with Rule 37 of this Honorable Court, relative to cases from the United States Circuit Court of Appeals, and the same is marked "Exhibit A."

Thirteenth.—Your petitioner is advised and believes that the said judgments of the said United States Circuit Court of Appeals are erroneous and this Honorable Court should require the said cases to be certified to it for its review and determination, under and in conformity with the provisions of the Sixth Section of the Act of Congress, entitled, "An Act to establish Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes." Approved March 3rd, 1891.

Fourteenth.—A. The question presented by these cases is whether, when a shipper sues for compensation on account of secret and unreasonable and unlawful preference by a railroad to other shippers, and the evidence which is necessary to prove the claim is contained in the books and papers under the power and control of the railroad company which has committed the unlawful act, the railroad company can refuse to produce the books before trial and also at the trial. In other words, are the rights given to individuals under the Interstate Commerce Act in the nature of penalties, and if so can the Pennsylvania Railroad Company, the corporation defendant, take advantage of the attributes of a penal action in favor of a natural person and refuse to produce the books both at and before the trial of the cause?

B. Does Section 724 of the Revised Statutes provide for the production of books and papers containing evidence pertinent to the issue, before trial?

C. Did the decrees in these cases which directed Alexander J. Cassatt, President; John B. Thayer, Fourth Vice-President, head of the Traffic Department; Charles E. Pugh,

Second Vice-President, head of Transportation Department; W. W. Atterbury, General Manager; Michael Trump, General Superintendent of Transportation; R. M. Patterson, Superintendent of Freight Transportation; J. G. Searles, Coal Freight Agent; George W. Creighton, General Superintendent; William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Robertson, R. L. Head, agents and employees of the Pennsylvania Railroad Company, as custodians of the books and papers of the Pennsylvania Railroad Company, to produce the same, give either the Pennsylvania Railroad Company or any of the above named custodians of these books and papers the right to complain that the actions are penal in their character and that therefore the books and papers do not have to be produced either before or at the trial?

D. Can the officers and agents of a corporation, when ordered as such to produce books and papers belonging to the corporation, of which they are such officers and agents, appeal as individuals directly from such orders or decrees as were made in these cases without any further proceedings in the Court below and without the Pennsylvania Railroad Company, the corporation defendant in the principal suit, appealing or raising any objection to the decree?

Fifteenth.—A short outline of the argument on these questions that was presented in the Circuit Court, and the Circuit Court of Appeals, and will be presented in your Honorable Court, is as follows:

On behalf of the plaintiffs it is contended that the production of the books and papers asked for in the petitions or orders in the Circuit Court and decreed by the Circuit Court to be produced before the trial of the case are absolutely necessary to the success of the cases of the plaintiffs. Not only should the books be produced at the trial, but they should be produced at a convenient time to both parties prior to the trial, so that the plaintiffs will have some

opportunity to examine the books and marshal the evidence and thereby not only permit the plaintiffs to conduct their cases intelligently, but will save the public time in the trial of the cases.

The defendant contends that the actions arising under sections 2, 3 and 8 of the Interstate Commerce Act are penal actions; that in penal actions chancery will not compel discovery and that as section 724 of the Revised Statutes states that the books and papers will be ordered to be produced by the Court "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," therefore the plaintiffs in these cases have no right to the production of the books either at or before the trial or any other time.

The language of the sections is as follows:

"SECTION 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, that it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or

locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in and respect whatsoever."

"SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing, in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the Court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

The decrees of the Circuit Court ordered the books and papers produced prior to the trial, as will be seen by a reference to the record hereto appended and marked "Exhibit A." When the matter was taken to the Circuit Court of Appeals the principal question argued was, whether or not the actions brought by the plaintiffs under authority of Section 8 of the Interstate Commerce Act were penal actions, and whether or not the Pennsylvania Railroad Company, the corporation defendant, could take advantage of the immunity given to natural persons to withhold their books and papers from disclosure in penal actions. There were some other minor questions argued and among others was the further question as to whether Section 724 gave the right to demand inspection of the books prior to the trial of the case, and also whether the plaintiffs in error in the Circuit Court of Appeals had authority of law for appealing as individuals from an order to produce books and papers made upon them, in their capacity as officers and agents of the Pennsylvania Railroad Company, to produce the books and papers of the said Railroad corporation. There was some

argument made as to whether the order or petition filed in the Circuit Court was sufficiently definite, etc., but the overshadowing question in the proceedings was the question whether the actions were penal in their nature and whether the corporation could take advantage of the protection from discovery which natural persons have in penal actions. In the majority opinion by the Circuit Court of Appeals, it is stated that the question as to the penal nature of the actions and as to whether the corporation would have to produce the books at the trial was not argued. It is respectfully submitted that the burden of the argument, both oral and written, on the part of the counsel for the plaintiffs in error in the Circuit Court of Appeals was devoted to the question as to whether the books and papers would have to be produced on account of the penal nature of the actions. A copy of the printed paper books of each side is herewith appended, marked "Exhibit B." No distinction was made in that particular branch of the argument between production before trial and production at the trial. It is true that a further question was argued by the counsel for the plaintiffs in error in the Circuit Court of Appeals, and that was, independently of every other question, that the production of the books and papers could not be ordered under Section 724 of the Revised Statutes before the trial. This was the question that was decided by the Circuit Court of Appeals and the contention in this respect of the plaintiffs in error was sustained, to wit, that no books or papers could be ordered to be produced before the trial of the case, but the said majority opinion of the Circuit Court of Appeals left open the real and controlling question in the cases and gave such suggestions as will undoubtedly cause the Pennsylvania Railroad Company, defendant corporation, to refuse to produce the books or papers at the trial of the case, and if, which is likely, this course will be followed by the Pennsylvania Railroad Company, the defendant corporation, it would be practically a denial of justice to the plaintiffs. The plaintiffs could not prove their cases without the aid of the

books and papers of the Pennsylvania Railroad Company. The records of the secret rebates paid to other shippers and the records of the distribution of coal cars and the orders giving to favored shippers arbitrarily a number of coal cars before any disposition was made among the other miners and shippers along its railroad are all in the possession and under the control of the Pennsylvania Railroad Company. Indeed, the Pennsylvania Railroad Company compels the miner and shipper to accept the weights and measures which it determines in its weigh office in Altoona. Such was done in the cases of the plaintiffs during the periods complained of. The Pennsylvania Railroad arbitrarily determined and carried out the policy of having one absolute record covering the transportation of coal and it made its own record the record for all parties, shipper and carrier alike. It is easy to see, therefore, to what disadvantage a shipper who brings suit under Section 8 of the Interstate Commerce Act is put in order to prove his case.

It is submitted that the books of a carrier corporation, such as the Pennsylvania Railroad Company, are *quasi* public records, and over and above all this, the records of shipments and distribution of cars are by the rules and practices of the Pennsylvania Railroad Company, as above stated, really made the records of both parties, and in these suits and for the matters complained of in these suits the records of distribution of cars and the transportation of coal and payments therefor are records in which both the plaintiffs, the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company, and defendant, the Pennsylvania Railroad Company, have a common interest, and the said plaintiffs, the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company, should have an inspection of the same.

This question as to whether the claims of shippers under Section 8 of the Interstate Commerce Act is of a penal character and whether corporations can take advantage of it is of the utmost importance, for as a result of the methods

and practices of carrying corporations, certainly so far as coal transportation is concerned, the railroad company, by closing its books and papers, can deny completely to a shipper who has been unlawfully discriminated against, the proof by which the shipper can sustain his claim and the rights given under the Interstate Commerce Act to the shipper will be in name only, and as that question is involved in these cases, and as so many cases, not only in this Circuit, but in all the other Circuits, are waiting for a determination of this question, it is hoped that your honorable Court will take jurisdiction of and decide this much mooted question. To make the benefits conferred by Section 724 of the Revised Statutes complete, it is submitted that it should be judicially determined by the highest Court in the land as to whether or not the corporation defendant, the Pennsylvania Railroad Company, in these cases, can take advantage of the so-called penal nature of the actions under Section 8 of the Interstate Commerce Act and thereby prevent any disclosure of its books and papers at the trial, and, also, whether it should not be compelled to produce the books and papers a few days before the day set for trial of the case. As will be seen from the opinion of the Circuit Court of Appeals, and as is no doubt well known to your honorable Court, there is no question to-day upon which there is such a diversity of opinions between Judges of the same Court and between the various Circuits as there is upon the construction of this Section 724 of the Revised Statutes, and especially in its relations to alleged penal actions in which corporations are plaintiffs or defendants.

Prior to the disposition of these cases in the Circuit Court of Appeals, the last and best considered case was the case of Bloeds *vs.* Bancroft & Sons Co., 98 Federal, 175. In that case almost all of the other cases in the various Circuits on this question of the construction of Section 724 were reviewed, and the Court in that case finally came to the conclusion, after attempting to reconcile the various conflicting decisions, that the true constriction of Section

724 called for the production of the books and papers before the trial of the case.

These cases, being the last decided cases on the subject, decide that the books and papers shall not be produced before the trial of the cases and further intimate that it is a question whether the Pennsylvania Railroad Company, the defendant corporation, will be compelled to produce the books and papers even at the trial of the case itself. A true construction of Section 724 of the Revised Statutes, both on the question as to production before trial and also whether a corporation defendant can refuse to produce books and papers even at the trial under action brought by virtue of the authority of Section 8 of the Interstate Commerce Act, are eagerly awaited by the profession as well as litigants, and, it is submitted, by the Judges of the various Circuits and Circuit Courts of Appeals.

Your petitioner thus respectfully submits that the questions upon the legal and just construction of the effect of the said Section 724 of the Revised Statutes, involved in and presented by the said cases of your petitioners, should be authoritatively and finally adjudged by this honorable Court upon and after a full presentation to the Court of the merits of said questions on the part of the said petitioners, and Alexander J. Cassatt, *et al.*, the plaintiffs in error in the Circuit Court of Appeals and the defendants in error in your honorable Court.

Wherefore, your petitioner respectfully prays that Writs of *Certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals, Third Circuit, commanding said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings of the said Circuit Court of Appeals in the said cases, therein entitled Alexander J. Cassatt, *et al.*, plaintiffs in error, *vs.* Webster Coal and Coke Company, defendant in error, October Term, 1906, No. 8, and Alexander J. Cassatt, *et al.*, plaintiffs in error, *vs.* Pennsylvania

Coal and Coke Company, defendant in error, October Term, 1906, No. 6, to the end that the said cases may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals; to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3rd, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this honorable Court. And your petitioner will ever pray. Counsel for Petitioner.

WEBSTER COAL AND COKE COMPANY,

By W. A. Lathrop.
President.

PENNSYLVANIA COAL AND COKE COMPANY,

By W. A. Lathrop.
President.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA. } *ss:*

W. A. Lathrop, being duly sworn according to law, doth depose and say that he has read the foregoing petition and that the facts therein stated are true to the best of his knowledge, information and belief, and that he is President of both the Webster Coal and Coke Company and the Pennsylvania Coal and Coke Company, the two petitioners, and is authorized to make this affidavit on their behalf.

Sworn and subscribed to before
me this 25 day of February W. A. Lathrop
1907.
A. A. Jones
Notary Public,
My commission expires at.

No. [illegible] Term, 1903.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

[illegible]

APR 23 1903

JAMES H. [illegible]

Alexander J. Cassatt, John B. Thayer, [illegible] Attorney, Michael Bonner, R. M. Patterson, George W. Creighton, William W. Strong, Cass A. Herron, William J. Hinchman, A. E. Fitler, William A. Thompson, Charles E. Strong, Charles Klingensmith, A. D. Roberts, and E. L. Hall, Plaintiffs in Error,

vs.

Webster Coal and Coke Company, Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF PLAINTIFFS IN ERROR.

JOHN G. JOHNSON,

[illegible]

vs.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

October Term, 1906. No....

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Roberts and R. L. Head, Plaintiffs in Error.

vs.

Webster Coal and Coke Company, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF PLAINTIFFS IN ERROR.

I. STATEMENT OF THE CASE.

The Webster Coal and Coke Company, the defendant in error, instituted as action of *assumpsit* in the Circuit Court of the United States for the Eastern District of Pennsylvania against The Pennsylvania Railroad Company to recover damages for an alleged violation, between October 1st, 1901, and September 1st, 1903, of the Interstate Com-

merce Act, (1) by reason of an alleged discrimination in favor of other coal shippers and against the Webster Coal and Coke Company in the number of cars furnished the Webster Company for the transportation of its product to market, and (2) by reason of an alleged payment by The Pennsylvania Railroad Company of certain alleged rebates or drawbacks to the Altoona Coal and Coke Company and the Glenn White Coal and Lumber Company for transporting, at their own expense, upon lateral lines of railroad, the coal from their mines to the main line of The Pennsylvania Railroad Company (Record, pages 5 and 8). The Pennsylvania Railroad Company pleaded "Not guilty." Prior to the trial of the cause, to wit, on April 12th, 1906, upon an application and motion (Record, pages 15 and 18) of the Webster Coal and Coke Company, and after answer filed by the Railroad Company denying the power of the court in this proceeding to make the order prayed for (Record, page 20), the court made an order (Record, page 22-23) upon the plaintiffs in error, all of whom were officers or employees of the Railroad Company, directing them, prior to the trial of the case, to produce and submit to the examination of the Webster Coal and Coke Company, their agents, accountants, and attorneys, the so-called "Daily Distribution Sheets" and certain other orders and papers belonging to the Railroad Company, dealing with the distribution of coal cars by the Railroad company between the periods embraced within the plaintiff's statement of claim. To this order of the court the plaintiffs in error filed exceptions, and prayed for and were allowed this writ of error.

II. Specification of Errors.

1. The Circuit Court erred in entering the order and decree of April 12th, 1906, requiring the plaintiffs in error to submit to the inspection of the plaintiff, and its counsel,

prior to the trial of the said cause, the books, records and papers referred to in said order.

2. The Circuit Court erred in entering the order and decree of April 12th, 1906, requiring the plaintiffs in error to produce at the trial of the cause the books, records and papers referred to in the said order.

III. Argument.

The question involved in this case is as to the power of a Circuit Court of the United States in an action for alleged violation of Sections 2 and 3 of the Interstate Commerce Act, (Act of Congress of February 13th, 1887), to enter an order against individuals who are officers of the defendant railroad company compelling such individuals to produce, prior to the trial of the cause, and submit to the examination by the plaintiff and its agents, books and writing belonging to the defendant Company, which are in the possession of such company.

(*a.*) The order of the court below is claimed to be justified by Section 724 of the Revised Statutes, which provides as follows:—

> "Power to Order Production of Books and Writings in Action at Law.
>
> "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books of writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him in default"

It is submitted that this section of the Revised Statutes does not justify the order in question, and that the same, under the circumstances of this case, is open to three fatal objections.

1. The order is directed to and against individuals and not to and against a party to the cause, as required by Section 724.

2. The action in which the order complained of was entered is a penal action, and therefore Section 724 is not applicable.

3. Section 724 does not authorize an order for production of books and papers prior to the trial of the cause.

1. The order is directed to and against individuals and not to and against a party to the cause as required by Section 724, of the Revised Statutes.

Under Section 724 of the Revised Statutes, the court is only authorized to require *the parties* to produce books or writings in their possession or power and the penalty for a non-compliance with the order on the part of the defendant is the entry of a judgment against him by default. The plaintiffs in error, though they were officers and employees of the defendant company, are not parties to the suit, and therefore the court had no power to enter such an order against them. Otherwise, the court might enter judgment by default against a defendant upon a non-compliance by third persons, who had ceased to be employees of the defendant company, with an order made against such persons. Suppose the plaintiffs in error had resigned from the Railroad Company the day the order was entered, their power and control over the books of the Railroad Company would have ceased the moment they resigned, and upon such resignation they might have ceased to have the slightest interest, direct or indirect, with

the affairs of the Company, and yet the court would be authorized to enter judgment against the Company by reason of a failure on the part of the persons now perfect strangers to the Company to comply with the order. The mere fact that the plaintiffs in error happened to be occupying important positions in the Railroad Company cannot affect the principle, for it is perfectly conceivable that an order of this kind might be entered against the humblest employee even though he only were employed from day to day.

Furthermore, the penalty prescribed by Sec. 724, for a non-compliance with an order granted thereunder, is conclusive as against the validity of an order directed not to a party to the cause, but to third persons, even though they be such party's agents. It is monstrous to assume that the severe penalty of judgment by default may be entered against a defendant by reason of the failure of his bookkeeper to comply with an order directed to such bookkeeper. Yet that is what the practice sanctioned by the order of the court below amounts to.

The illegality of such an order directed to an agent of a party to the cause has been flatly settled by a decision of the Supreme Court in Pennsylvania in Rose *vs.* King, 5 S. & R. 241. There is a statute in Pennsylvania, viz., the act of February 27th, 1798, (3 Sm. Laws, 303), which was founded upon and is almost identical with the provisions of Sec. 724 of the Revised Statutes. (Opinion of Mitchell J. in Moelling *vs.* L. C. & N. Co., 9 Phila., 324.) The Pennsylvania Statute provides as follows:—

"The Supreme Court, and several courts of common pleas in this state, shall have power, in any action pending before them, on motion, and upon good and sufficient cause shown, by affidavit or affirmation, and due notice thereof being given, to require the parties, or either of them, to produce books or writing in their possession or power, which contain evidence pertinent to the issue; and if either party shall fail to comply with such order, and to produce

such books or writings, or to satisfy said courts why the same is not in the party's power so to do, it shall be lawful for the said courts, if the party so refusing shall be a plaintiff, to give judgment for the defendant as in cases of non-suit, and if a defendant to give judgment against him or her by default, as far as relates to such parts of the Plaintiff's or Plaintiffs' demand, or the Defendant's or Defendants' defence, to which the books or papers of the party is alleged to apply."

In Rose *vs.* King, the lower court made (under the provisions of the Act of 1798) an order upon an agent of the Plaintiff for the production of certain papers at the trial of the Cause. Upon a non-compliance with the order, the penalty prescribed by the Act of 1798, viz., a non-suit was enforced, which was reversed by the Supreme Court of Pennsylvania on the ground that under the act of 1798, the order was defective if directed to a third person, even though he be an agent of a party to the record. Mr. Justice Gibson, saying:—

"The affidavit is also defective, in not alleging that the deed was in possession of the plaintiffs. It was seen in the possession of Seely Huling, who was an agent of the Plaintiffs; but whether as an agent or as the owner of it, and if the former, whether it remained in his possession at the time of its application, does not appear. If it were Seely Huling's own, or not entrusted to his care by the Plaintiffs, it would not be peculiarly in their power; and, of course its production could not be enforced under the Act; but the party wishing to use it, would have to resort to the usual means of a subpœna with a *duces tecum*. The notice was served also at a period altogether too late, being only three days previously to the granting of the rule; and the rule itself was wrong, being made not only during the trial, but personally on Seely Huling, who was at most but an agent; it should have been on the Plaintiffs in the cause. *A Court has no right to designate a third person, not marked as such on the record, as the real party, and*

proceed against him: It is the Plaintiff of record who is to be nonsuited, and the rule must be against him. It was unnecessary to treat Seely Huling as the party; if he were in fact so, the production of the paper might have been procured by a rule on the plaintiffs of record, which would have given the defendants all the benefit they were entitled to in any shape. If the paper came to his possession as an agent, it was to be considered in the power of the plaintiffs for all purposes beneficial to the defendants, in a proceeding on the act; if it were his own, he would, even though substantially interested, be bound to produce it on a subpoena."

So also in Ridgely *vs.* Richard, 130 Fed., 387, an application was made under Section 724, to compel one of the defendants, who is also an officer of a corporation not a party to the cause, to produce the papers of such other corporation. The court declined to make the order upon the ground that such corporation was not a party to the action.

It is no answer to the authority of these cases to refer to the practice in equity of making the officers of a corporation parties defendant to a bill of discovery against the corporation. The reason for such a practice was that a corporation answers under seal and not under oath, and therefore to obtain discovery under oath it is necessary to join as co-defendants the officers of the defendant corporation. (Cyc. of Law and Practice, Vol. XVI., page 311; Hare on Discovery, page 83.) That principle has obviously no application to the question under consideration. What that plaintiff has asked for is not mere discovery under oath as to the contents of documents, but their actual production for the inspection of the plaintiff prior to trial and an order calling for such production may be made against the defendant company as well as against its officers and employees.

There cannot be any doubt therefore that an order of this character directed against employees of a party to the cause and not against such party itself is not authorized

by Section 724 or any other provision of the Revised Statutes.

2. The action in which the order complained of was entered is a penal action and therefore the remedy prescribed by Section 724 is not Applicable.

The power of the court to make an order of this kind is expressly limited by Section 724 to "cases and under circumstances where they (the parties) might be compelled to produce the same by the ordinary rules of proceeding in chancery."

It is, of course, elementary law that a defendant is protected from making discovery where the effect of which might be to subject him to criminal prosecution or to a penalty or a forfeiture, (Cyc. of Law and Practice, Vol. XIV., pages 333, 335; Hare on Discovery, page 131), and it was accordingly held in Newgold *vs.* American Novelty Co., 108 Fed. 341, that in a *qui tam* action to recover the penalty prescribed by Section 4901 of the Revised Statutes for falsely marking an article as patented, the defendant could not be compelled, under Section 724, to produce books or papers containing evidence against him either for use in evidence at the trial or for inspection of the plaintiff before the trial.

Brown, J., said:—

"The provision of Section 724 above quoted, expressly limits its application to cases and circumstances where the party "might be compelled to produce the books and papers by the ordinary rules of proceeding in chancery." But no such production as here sought would be required by the ordinary rules of proceeding in chancery for use in an action for penalties like the present. "It is a universal rule in equity," says Story, J., "never to enforce either a penalty or a forfeiture; and a bill of discovery will not lie in a case which involves a penalty or a forfeiture." So also, in Finch *vs.* Rikeman, 2 Blatch., 301, where an action was brought to recover damages for the infringement of a patent the

court refused to make an order (under Section 724) on the defendant to produce his books and papers, as the effect of the evidence would be to subject the defendant (under Section 14, of the Act of July 4, 1836) to a penalty of three times the amount of the damages suffered by the plaintiff. Betts, J., said:—

> "The relief proposed to suitors by that practice was, however, more especially defective in affording no summary sanction to an order to produce papers, which should apply to and affect the cause itself. The Act of Congress remedies this deficiency, by authorizing a final judgment or a judgment of non-suit, as the case may require, so that the rights of the party in the suit are made dependent on his compliance with the order against him to produce the books and papers. These are stringent conditions, and require from Courts a careful consideration of the provisions of the Act, before enforcing them. The plain limitation to the right to the interposition of this Court by giving final judgment, is, that the application by a party for the production of papers be one which a Court of Equity would sustain on a bill of discovery. The right, in our opinion, rests entirely on that condition.
>
> "This motion demands the production of defendants' books, to establish the quantity and value of the manufacturers of machinery made by the defendants, which manufacture is charged in the declaration to be an infringement of the plaintiff's patent. The effect of the evidence sought for will be not only to enable the plaintiff to recover his entire damages, but its direct consequence will be to subject the defendants to a penalty of three times the amount of those damages, under Sec. 14 of the Act of July 4th, 1836, (5 U. S. Stat. at Large, 123). We think it against the rules of Equity, to allow a bill of discovery in such a case, unless the bill relinquishes all claim to the penalty which may be superinduced by the production and exhibition of the books, and, for that cause, the motion must be denied."

This rule is not affected by the fact that the particular action in which the production of the books and papers

is sought is a civil one for damages. It is sufficient ground for declining to require the production of books and papers that such production might subject the defendant to a criminal prosecution.

In U. S. *vs.* National Lead Co., 75 Fed., 94, an action was brought by the United States to recover back certain drawbacks paid the defendant upon certain imports of raw material upon the allegation that the manufactured article was exported, which allegation was claimed to be false. A petition having been filed under Section 724 asking for the production of books and papers prior to trial the court held that the documents, if produced would tend to show the commission of a crime by the defendants, and that therefore no order for production should be made, Green, J., saying:—

> "But there is a more serious objection to the granting of this motion, and which is radical in its nature. Although the pending suit is, in terms, simply one to recover money had and received by the defendant to and for the use of the plaintiff, yet it is evident that the real gravamen of the action is the alleged fraud and misfeasance of the officers, agents, and servants of the defendant corporation, committed by them, or some of them, in the name and for the benefit of the corporation, in the making and presenting of false, deceitful, and fraudulent claims for drawbacks or rebates of duties on imported lead ore, and thus unlawfully obtaining the very large amounts of money involved in this suit. To obtain such rebates or drawbacks, the statute requires the claim to be verified by oath. This was done in the claim made by the defendant. If, therefore, the allegations of plaintiff are true, the officers and agents of the defendant corporation who were guilty of making these fraudulent claims have laid themselves open to criminal prosecution, and the corporation itself has become liable to the penalties and forfeitures affixed to such acts by the statute. Now, the plaintiff alleges that the evidence of these unlawful acts is to be found in the books of the defendant, and for that very reason asks for the order requiring their production. But because of that very reason the order asked for ought

not to be granted. It is not necessary to base the refusal to grant the order, under these circumstances, upon the protective clauses of the Constitution of the United States. Just, and in fact peremptory, reasons for such refusal are to be found clearly written in the statute, which confers upon the court the power sought to be invoked. Such power is, by the words of the statute, to be exercised only under circumstances where the parties might be compelled to produce the books and writings "by the ordinary rules of proceedings in chancery;" in other words, the order asked for is to be made only where circumstances would justify a discovery in proceedings in equity. This limitation upon the exercise of this power to require the production of books and writings absolutely bars the granting of the present motion, for it is a cardinal rule of chancery that a discovery will never be decreed when it might tend to convict the party of a crime or work a forfeiture of his property. Nor is this rule confined to cases in which discovery must necessarily subject the defendant to pain and penalties, but it is broadly extended to cases where it may do so. The discovery sought may, indeed, have no immediate tendency to criminate the defendant, but that does not militate against the enforcement of the rule that the defendant is not bound to accuse himself of crime, or to furnish any evidence whatever which shall lead to any accusation of that nature. I Daniell, Ch. Prac. 563; March *vs.* Marsh, 16 N. J. Eq. 391. As was tersely said by Mr. Justice Bradley in Boyd *vs.* U. S. 116 U. S., 616, 6 Sup. Ct. 524, in commenting upon this statute:

"'Compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.'

"Hence it is clear that this statute, instead of authorizing the order asked for by the plaintiff, requires its denial. Equity has placed its veto upon such applications when made under circumstances which characterize this case,

> and, if equity would refuse to decree discovery, this court is powerless to order it to be made. The motion is denied, and the petition is dismissed.'

It is important to remember that the Plaintiff does not allege that the transportation rates charged it were unreasonable, but does allege that the Plaintiff has been discriminated against in its car supply and by the payment of certain alleged rebates to others in violation of sections 2 and 3, of the Interstate Commerce Act, which provides as follows:—

> "SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers, or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.
>
> "SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The right of action created by these sections and which the plaintiff seeks to enforce, is a right of action unknown at common law, and is the creation of a penal statute and therefore the plaintiff is not entitled to the remedy conferred by section 724. The obligation of the carrier at

common law was merely to charge each customer a reasonable rate. The doctrine that a carrier may not discriminate is a creation of statute, and so far as interstate commerce is concerned owes its entire life and being to the Interstate Commerce Act.

The rule at common law was thus stated by Byles, J., in Baxendale *vs.* Ry., 4 C. B. (N. S.) 63, when he said:—

> "I know of no common law reason why a carrier may not charge less than what is reasonable to one person or even carry for him free of all charge."

In the English notes to Coggs *vs.* Bernard, 1 Smith's Leading Cases 283, it is said with respect to the obligation of the common carrier at common law:—

> "The higher charge must be no more than a reasonable remuneration to the carrier, although at common law there is no liability to carry out equal rates for all customers."

In (1886) Menacho *vs.* Ward, 27 Fed. 529, Judge Wallace said:—

> "Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relation with the public."

So, also, in U. S. *vs.* D. L. & W. R. R. Co., 40 Fed. 101, Judge Wallace again said:—

> "By the common law, although public carriers are not permitted to make unreasonable discrimination in per-

forming the services which they undertake between those whom it is their duty to serve the discrimination which is unreasonable is such only as enures to the undue advantage of one person or class of persons in consequence of some injustice inflicted upon another. The carrier is not obliged to treat all who patronize it with absolute equality. Thus it is privileged to charge less than fair compensation to one person or to a class of persons and others can not justly complain so long as he carries on reasonable terms for them. *That privilege can no longer be exercised under the Interstate Commerce Act by the carriers subject to its provisions in the transportation of a like kind of traffic under substantially similar circumstances and conditions.* Again, it is no part of the common law obligation of railway companies to furnish the same facilities or instrumentalities of transportation to all alike, and while it is unquestionably their duty to furnish suitable and adequate facilities for all reasonable necessities of the business they engage in they may nevertheless choose their own appropriate means of carrier * * *. But the Interstate Commerce Act requires them to treat all impartially, and if one shipper is subjected to any undue or unreasonable prejudice or disadvantage because a railway company permits another shipper to use his own cars for carrying traffic over its road their right to choose their own appropriate lines of carriage is to that extent curtailed."

In I. C. C. *vs.* B. & O. R. R. Co., 145 U. S. 263, Mr. Justice Brown said:—

"Prior to the enactment of the Act of February 4, 1887, to Regulate Commerce, commonly known as the Interstate Commerce Act, railway traffic in this country was regulated by the principle of the common law applicable to common carriers which demanded little more than that they should carry for all persons who apply in the order in which the goods were delivered at the particular Station, *and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service.*"

That the Interstate Commerce Act is a penal statute has been flatly decided by the Supreme Court of the United States in Parson *vs.* Ry. Co., 167 U. S. 447, which was an action by a shipper against a railroad company for a violation of the Interstate Commerce Act in charging the plaintiff a concededly reasonable rate, but making a lower charge to other shippers under substantially similar circumstances and conditions. In delivering the unanimous opinion of the court that the plaintiff had failed to prove his case, Mr. Justice Brewer said:—

> "We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates charged for shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover money which inequitably and without full value given has been taken from him. He is only seeking to recover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant.
>
> "*Again, his cause of action is based entirely on a statute, and to enforce what is in its nature a penalty.* Suppose the officials of the defendant company had charged the plaintiff only a reasonable rate for his personal transportation from his home in Iowa to Chicago, and at the same time had, without any unjust occasion therefor, given to his neighbor across the street free transportation, thus being guilty of an act of favoritism and partiality—an act which tended to diminish the receipts of the railroad company, and to that extent the dividends to its stockholders—such partiality on their part would not, in the absence of a statute, have entitled the plaintiff to maintain an action for the recovery of the fare which he had paid, and thus to reduce still further the dividends to the stockholders. So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter

though it appeared that through any misconduct or partiality on the part of the railway officials shippers in Nebraska had been given a less rate.

"It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another. *But it is familiar law that no one who is seeking to recover a penalty is bound by the rule of strict proof.* Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act he must make a case showing not by way of inference but clearly and directly such violations. No violation of statute is to be presumed.

"The allegation is that this joint tariff was not filed with the commission, and not published at the Iowa stations from which plaintiff made his shipment, and that in consequence thereof he was ignorant of its rates. His argument practically is that if the tariff had been filed with the commission it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted he might have examined the rates and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff. But these 'might be's' interfere very materially with the line of sequence. He does not show that he had not already contracts with some consignee in Chicago, New Orleans or some place other than the four eastern points named in the tariff, for shipment to him of all grain at his command. He does not allege that he had or would have made any arrangements with any consignee in any of those points for the receipt and sale of his corn or even that the extra commissions there would not more than make the difference in rates. In short, he does not allege, either directly or indirectly, that if he had known of these rates he would have shipped his corn, under this tariff, to either of those points, but rests his contention upon the suggestion that the mere difference in the prices would naturally have caused him to ship to one or the other of them, and thus to take advantage of the joint tariff. Every fact which he alleges

might be absolutely and fully true, and yet he, with knowledge of the joint tariff, with the privilege of shipping under it, has never offered or sought to forward a single pound of corn to any other place than Chicago. *Sure it needs but the statement of this to show that he comes far short of that rule of strict proof which enables one to enforce a penalty for wrong;* for, if he would not under any circumstances have shipped to New York, was compelled by his contracts or any other consideration to ship to Chicago, he cannot say he was injured by his ignorance of the rate to New York. The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So, before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. *Penalties are not recoverable on mere possibilities.* We think, therefore, without attempting to take judicial knowledge of the general order made by the Interstate Commerce Commission in reference to the publication of joint tariffs, the plaintiff has failed in that full and clear showing of injury which is necessary in order to justify a recovery under the Interstate Commerce Act."

In Logan *vs.* R. R. Co., 132 Pa. St. 403, the plaintiffs brought an action for alleged discrimination in freight charges; the first count of their declaration embracing the amount of the discrimination in rate; the second count asking for treble damages under the provisions of the Pennsylvania Statute of June 4, 1883, P. L. 72, which provides as follows:

"Section 1. That any undue or unreasonable discrimination by any railroad company or other common carrier, or any officer, superintendent, manager, or agent thereof, in charges for or in facilities for the transportation of freight

within this State or coming from or going to any other State is hereby declared to be unlawful."

"Section 2. No railroad company or other common carrier engaged in the transportation of property, shall charge, demand or receive from any person, company or corporation, for the transportation of property, or for any other service, a greater sum than it shall charge or receive from any other person, company or corporation for a like service, from the same place, upon like conditions, and under similar circumstances; and all concessions in rates and drawbacks shall be allowed to all persons, companies or corporations alike, for such transportations and service, upon like conditions, under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals, or between individuals and transportation companies, or the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered."

The plaintiffs having made a motion for the production of books and papers by the defendant under the Act of February 27th, 1798, (3 Sm. Laws 303), the court refused the same upon the ground that the action was in substance an action for the recovery of a penalty. Plaintiffs then amended their declaration by adding a third count, which claimed the actual amount of difference in rate charged them between 1881 and 1886. Upon a re-argument as to their right under the third count to compel the production of books and papers by the defendant, the court held unanimously that no production could be had as to writings and papers showing or tending to show a discrimination subsequent to June 3d, 1883, the date of the passage of the Pennsylvania Statute, but that the production of books and papers could be decreed, which would show discrimination prior to the date of the passage of this statute.

In view of the provisions of the third count which claimed actual and not treble damages, both prior as well as sub-

sequent to the passage of the Act of June 4th, 1883, this case must have been decided upon the theory that where there is a statute which declares a particular transaction unlawful and also imposes an additional penalty for a violation thereof, and an action is brought for the actual damages resulting to the plaintiff from the violation of the statute, irrespective of the penalty, production of books and papers cannot be decreed, as the statute is fundamentally a penal one, irrespective of whether the action seeks to recover only a portion of the penalty.

Can any one read the penal provisions Sec. 10, of the Interstate Commerce Act and doubt that the Act is not only a penal statute, but also a criminal one?

> "SEC. 10 (as amended March 2, 1889). That any common carrier subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: Provided, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

And yet it is to establish a violation of such a statute by the Railroad Company that the Plaintiff asks for discovery from the officers and employees of the Railroad Company. There can be but one answer to that proposition, viz., that a Court of Equity would not decree discovery under such circumstances and accordingly a court of law authorized to require the production of books and papers "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery" will decline to compel under the circumstances of this case the production of such books and papers.

3. Section 724 does not authorize an order for the production of books and papers prior to the trial of the cause.

The decisions of the various circuits have varied with respect to this question. In U. S. *vs.* National Lead Company, 75 Fed. 94; Hyldon *vs.* Brown, 1st Wash. 298; Triplett *vs.* Washington, 3 Cranch C. C. 646; Iasigi *vs.* Brown, 1st Curtis, 401; Section 724 was held not to be applicable to production before trial, while in Bloede & Co. *vs.* Brancroft, 98 Fed. 175, and Gray *vs.* Schneider, 119 Fed. 474, the contrary rule is laid down. It is respectively submitted that there is nothing in the language of Section 724, or the reasons for the same, which necessitates a construction permitting the compulsory production of the books and papers of the adversary, at any time other than at the trial of the cause. On the contrary, there are valid and cogent reasons for restricting the application of Section 724 to production at trial.

The Pennsylvania statute of 1798, as above referred to, has been invariably restricted by the Courts of Pennsylvania to production at trial (Arrott *vs.* Pratt, 2 Whart. 566; Raub vs. Van Horn, 133 Pa. St. 573; Pa. Co. *vs.* R. R. Co., 9 Pa. County Reports 517; Reed *vs.* Stevenson, 12 Phila. 536; Thomas *vs.* Smith, 1 T. and H. Pr. Section 610), except where the parties have a common interest, *i. e.,* a common property in the document called

for, as the interest of a person selling on commission, in a book containing the entries of his sales (Boyce *vs.* Super, 35 W. N. C. 339), or the interest of a beneficiary in the original policy of insurance, in the possession of the Insurance Company (Pioso *vs.* Equitable Life Company, 12 D. R. 51), which exceptions to the general rule have obviously no application to the case at bar.

The reason for the restriction of the rule is thus stated in Thomas *vs.* Smith (*supra*), and quoted with approval in Raub *vs.* Van Horn (*supra*). "The Act of February 27, 1798, is a highly penal statute, and although in terms it does not confine the rule to produce books and papers to the trial of the cause, yet the uniform practice under the act has so confined it. To extend it further would be accompanied with great danger and inconvenience. The right to inspect books and papers before the trial has therefore been confined to the cases where the parties have a common interest in the instrument of evidence called for. Where books and papers are produced before the court and jury, in a public court, there is an evident restraint upon making an improper use of them. Were we to establish the precedent asked for, every defendant who was willing to pay the plaintiff's demand, would resort to this move for the purpose of fishing up a defense or attack upon the plaintiff, from his books and papers. * * *"

In this connection, the recent decision and opinion of the Supreme Court of Pennsylvania in International Coal Mining Company *vs.* P. R. R., 214 Pa. St. 469, Advance Reports for July 6, 1906, is instructive. In this case a rule of Court permitted depositions to be taken in advance of trial irrespective entirely of the witnesses being aged, infirm or going. A witness having been subpoenaed to appear before a Notary pursuant to a rule to take such depositions declined to answer certain questions. An order having been entered by the Court below directing him to answer, he took an appeal to the Supreme Court of Pennsylvania, who reversed the Lower Court upon the ground of the illegality of the procedure in question, and saying:—

"By the rule in the court below, under which the appellee insists that it has a right to examine the appellant outside of court and in advance of the trial, either party to a pending action may at any time, as a matter of course, with no cause existing for doing so, proceed to examine any witness in advance of the trial, though he be neither aged, infirm nor going, and there be no reason for supposing that he will not appear in court when subpoenaed to do so. The rule is: 'A rule may in like manner be entered by either party to take the depositions of witnesses without regard to the circumstances of their being aged, infirm or going witnesses, stipulating, however, eight days' notice to the adverse party; subject, nevertheless, in all other respects to the existing rules and regulations.'

"In the regular and orderly trial of a cause witnesses appear in open court, and jurors, from seeing, as well as hearing them, pass upon their credibility. Exception to this wise rule of the common law must be based upon some necessity requiring it to be disregarded in the interest of justice. But under the rule in the court below, for no reason and with no necessity for taking the deposition of a witness in advance of a trial, either party to the action, upon a mere whim or caprice, may compel the examination of every one of his witnesses before a magistrate or notary public in advance of the trial, and require the opposite party, with his counsel, to appear as often as such an examination takes place. In this disorderly innovation upon trial before a jury, licensed by the rule below, the rights of witnesses are not to be overlooked. As a rule it is inconvenient for any one to be interrupted in his business or vocation in life by being compelled in obedience to a subpoena, to appear in court to testify on the trial of a cause; but every member of society must expect at times to be subjected to this inconvenience, because the administration of justice and his duty as a citizen require him to submit to it. This, however, is not the case when he is compelled to appear before a commissioner to testify in advance of the trial upon the mere whim or caprice of a plaintiff or defendant, and in the absence of any necessity requiring him to so appear. There having been no reason shown why the appellant

> should have been subjected to the inconvenience and annoyance of being called before a notary public to testify as a witness for the plaintiff in advance of the trial, he has a right to complain of the unwarranted calling of him away from his business, especially as he is liable to be called into court by the very party taking his deposition, to testify on the trial of the cause. It is of this that he complains, and his complaint is just."

Furthermore it is respectfully suggested that there being a doubt as to the construction of Section 724, that the practice thereunder should conform to the practice in the courts of this State under the analogous Act of 1798 (See opinion of Dallas, J., in Frescole *vs.* City, 70 Fed., 337).

It is earnestly submitted, that if the Court shall sanction the practice of the compulsory production of books and papers for the examination of the opposing party prior to trial, it will merely encourage blackmailing litigation and motions for such productions, which will be mere fishing expeditions to obtain material to be used in pending or subsequent litigation. Of course, in the case at bar, where the Plaintiff is represented by honorable counsel, no improper use would be made of any information obtained under the order appealed from, but it is not difficult to imagine instances in which the right to examine books and papers prior to trial (if sanctioned by this court) would be used by unscrupulous practitioners, for the purpose of obtaining information to be used as a basis for other suits, and any rule laid down by this Court must apply not only to the honest litigant and responsible counsel but also to the dishonest litigant and unscrupulous counsel.

This method of obtaining evidence from your adversary as a means of furthering your own side of your litigation was unknown to the common law, and even to Courts of equity, except under the strict safeguards surrounding bills of discovery, where the explanation of a party accompanying the production of a document constituted evidence on his behalf. Under the procedure sustained by the learned Court below, either party to an action may at his pleasure

ransack the papers of the opposing party without the supervision and control exercised by the Court when papers are produced at trial. In the case of a certain class of litigations, the plaintiff therein, even if he fails to find anything which is helpful on such examination prior to trial, may discover something which is available for future litigation, or for blackmail, so that he may discontinue his pending litigation and start on a new track. It is even conceivable that a plaintiff of this class might even start litigation, not with any hope of success, but merely to make it a basis for a fishing expedition for ammunition. It is most strongly urged upon the Court that the practice in question serves no public purpose; it not justified by the terms of the Act of Congress, nor the principles of the Common Law or Courts of Equity, but that on the contrary it violates that sound public policy which frowns upon the professional litigant and his champertous attorney, and is a practice which should be condemned as strongly by this Court as the practice condemned by the Supreme Court of Pennsylvania in International Coal Mining Co. *vs.* Railroad Company (*supra*).

5. The order entered by the court below is, in substance, a final definitive order or decree against the Plaintiffs in error, from which a writ of error will lie.

The plaintiffs, by a petition addressed to this court, sought and secured an order upon the plaintiffs in error, requiring them to submit to the inspection of the plaintiff and its agents certain books and papers. The order thus obtained was a final one, in the sense that it exhausted the power of the court in the proceeding in which it had been made. Even failure, on the part of the plaintiffs in error, to comply with its directions, would not open the door to further proceedings or orders, for such failure on their part would not subject them to any pains or penalties whatsoever; the penalty of such disobedience would be visited upon the defendant in the main action, for by the provisions of Section 724 of the Revised Statutes, under which the

proceeding was had, failure to produce books and papers by a defendant when ordered authorizes "entry of judgment against the defendant by default" and this is the only penalty that follows such failure. In what respect then does the order fall short of being a final one?

> "Whenever in a cause there is a determination of some question of right, a decision is final, in the sense in which an appeal from it is permitted, if it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the court, so that to bring the cause again before the court for decision will not be necessary. Mackeye *vs.* Mallory (decided by this court February 23d, 1897), 24 C. C. A., 420, 79 Fed. 1; Rouse *vs.* Hornsby, 14 C. C. A., 377, 67 Fed. 219; Gumbel *vs.* Pitkin, 113 U. S. 545, 5 Sup. Ct., 616; Central Trust Co. *vs.* Grant Locomotive Works, 135 U. S. 207, 10 Sup. Ct. 736."

Wallace, Circuit Judge, in Butler *vs.* Fayerweather, 91 Federal Reporter, page 458.

Tested by the above definition of a final order the order involved in the present proceeding was certainly final, for beyond all controversy it did finally and completely dispose of the case to which the plaintiffs in error were parties, or in which they were concerned, leaving open no question or matter for further consideration or action by the court.

In International Coal Mining Company *vs.* Penna. R. R. Company, 214 Penna., 470, Lloyd, the appellant, having been directed by the lower court to answer a question at a meeting pursuant to a rule for depositions, refused so to do, and appealed to this court. In sustaining the appeal, Mr. Justice Brown, said, "If the appellant had not appealed from the order directing him to answer, the penalty for disobedience of it immediately confronted him. Though not interested in the result of the suit between the plaintiff and defendant, he is very much interested in the order of the court, which is final as to him, and he, therefore,

has a right to be heard on the question of the authority of the court to make it, *without waiting to be attached for refusing to obey it.*"

But it will doubtless be argued that the present case is controlled adversely to the plaintiffs in error by the decision of the Supreme Court in the case of Alexander *vs.* United States, 201 U. S. Reports, page 117. The two cases, however, are clearly distinguishable.

In the Alexander case a suit was pending in a Circuit Court of the United States under the Anti-Trust Act, and testimony was being taken before an examiner. The Circuit Court made an order requiring a witness to answer certain questions and to produce certain books before such examiner, and from this order the witness affected by it appealed. The Supreme Court dismissed the appeal holding that the order was not a final one. The court seems to have rested its decision upon the proposition that an order made upon a witness to answer questions or produce documents, either upon the trial of the cause or before an examiner, was not an order made in any case or controversy between the witness and the party at whose instance it had been entered; but was merely an interlocutory order in the main cause.

Mr. Justice McKenna, who delivered the opinion of the court, adopted as a correct statement of the law upon the subject the following extract from an opinion of Circuit Judge Van Deventer, rendered in a case in which that Judge had been called upon to deal with a somewhat similar question:—

> "I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the government, as a sovereign, vindicating the

> dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witness in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

It will be observed that the court holds that when a final order is made against a witness in any proceeding which can be regarded as a suit or controversy, to which he is a party, the right to appeal arises.

That this is a correct statement of the court's view is further shown by the manner in which Mr. Justice McKenna treats the previous decisions of the court in the cases of Interstate Commerce Commission *vs.* Brimson, 154 U. S., 447, and Interstate Commerce Commission *vs.* Baird, 194 U. S., 25.

In both these cases the question involved related to the power of the court to compel answers and production of documents by witnesses, and in both the Supreme Court had considered and acted upon appeals which had been taken from the orders made, and had consequently dealt with these orders, not as interlocutory in the proceedings in which the testimony was sought, but as final in the separate proceedings against the witnesses. "Those cases," says Mr. Justice McKenna, referring to the Brimson and Baird cases, "rested upon statutory provisions which do not apply to the proceedings at bar, and while there may be a resemblance to the latter there are also differences."

What the learned justice evidently meant by this was, that the orders in the Brimson and Baird cases were made in proceedings against the witnesses which were distinctly substantive proceedings of themselves, and were not merely orders made upon a witness called to testify in the main proceeding, for the court will observe that Mr. Justice McKenna saw no distinction between the case of a witness called to testify upon a trial and that of the witness called to testify before an examiner. "Why," he says, "should

greater rights be given a witness to justify his controversy when summoned before an examiner than one summoned before a court? Testimony at times must be taken out of court."

The effect of the decision in the Alexander case, taken in connection with the decisions in the Brimson and Baird cases, may be thus summarized:—

That when an order upon a witness to answer questions or produce documents is made in a proceeding against the witness, which amounts to a case or controversy within the generally accepted meaning of those terms, an appeal from such order will be sustained if the order is a final one; that where, however, the order upon the witness is made when he is upon the stand or before an examiner, such order cannot be appealed from because no case or controversy, to which the witness is a party, has arisen, but an appeal will lie at the instance of the witness when an order punishing him for refusing to answer or produce the documents has been made, because then an order has been made in a case or controversy to which the witness is a party.

It is confidently submitted that the present is within the first above mentioned class of cases, and that, consequently, the writ of error, which is now before the court, was properly taken.

JOHN G. JOHNSON,
Counsel for the Plaintiffs in Error.

EVENING POST JOB PRINTING OFFICE, NEW YORK

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 283.

IN CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

WEBSTER COAL & COKE COMPANY,
Plaintiff in Certiorari,

AGAINST

ALEXANDER J. CASSATT and Others,
Defendants in Certiorari.

BRIEF FOR PLAINTIFF IN CERTIORARI.

Statement.

The Webster Coal & Coke Company, plaintiff in certiorari, has pending and at issue in the Circuit Court of the United States for the Eastern Division of Pennsylvania an action at law against the Pennsylvania Railroad Company, defendant in certiorari, to recover damages under Section 8 of the Act to Regulate Commerce for unlawful discriminations practised by the defendant against the plaintiff in the matter of furnishing cars for the

transportation of coal and coke produced at the mines of the plaintiff in the State of Pennsylvania, and in the giving of rebates and otherwise (Record, pp. 4-8).

After issue joined and before trial the plaintiff gave notice to the defendant that an application would be made for an order requiring the defendant, its officers, agents and employees to produce for the inspection of plaintiff before the trial of the action certain books, records and documents in the custody and under the control of the defendant and permitting the plaintiff to prepare tabulated abstracts from said books, records and documents, and directing that the defendant upon failure to comply with an order so obtained should suffer judgment by default (Record, pp. 12-17). The application was based on Section 724 of the Revised Statutes of the United States, which is as follows:

> "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery. If a plaintiff fails to comply with such order, the Court may, on motion, give the like judgment for defendant as in cases of non-suit; and if defendant fails to comply with such order, the Court may, on motion, give judgment against him in default."

The railroad company filed an answer to such application and motion, alleging (1) that the action was brought to recover damages in the nature of penalties and that therefore defendant was not obliged to produce its books and papers for inspection either before the trial or at the trial; (2) that

even if the action was one in which the defendant could be required to produce its books and papers at the trial, it could not be required to do so before the trial; (3) that the defendant was then unable to state whether it could produce all the books and papers referred to in the plaintiff's petition; (4) that if any order be made it should be confined to such papers only as related to or affected the allotment of cars made within the period covered by the action (Record, pp. 18, 19).

On the return of the motion, the Court, after argument, made an order (Record, pp. 19-21) requiring Alexander J. Cassatt, president; John B. Thayer, fourth vice-president, head of the traffic department; Charles E. Pugh, second vice-president, head of the transportation department, and certain other officers and agents of the defendant, to produce and submit to examination of the plaintiff, its agents, accountants and attorneys, the books and papers of the defendant described in the petition, and also that the same be produced before trial at a specified time and place for the inspection of the plaintiff and with leave to the plaintiff to make copies thereof. Alexander J. Cassatt and the other officers and agents of the defendant named in the order sued out, as individuals, a writ of error, the assignments being:

> "1. The Circuit Court erred in entering the order and decree of April 12, 1906, requiring the plaintiffs in error to submit to the inspection of the plaintiff and its counsel prior to the trial of said cause the books, records and papers referred to in said order.
>
> 2. The Circuit Court erred in entering the order and decree of April 12, 1906, requiring the plaintiffs in error to produce at the trial of the cause the books, records and papers referred to in the said order."
>
> (Record, pp. 21, 22.)

Argument was had in the Circuit Court of Appeals for the Third District on this writ of error October 4, 1906, before the Honorable Judges Gray and Buffington, Circuit Court Judges, and the Hon. Judge Lanning, District Judge for the United States District Court of New Jersey, and at the same time a similar question was argued in *Pennsylvania Coal & Coke Company* vs. *Pennsylvania Railroad Company*, and *Mitchell Coal & Coke Company* vs. *Pennsylvania Railroad Company*. The Circuit Court of Appeals, in deciding the cases, filed a majority and a minority opinion (Record, pp. 25-41) in the Mitchell Coal & Coke Company's case and made the majority opinion cover and determine the questions presented in the other two. The opinion in the Webster Coal & Coke Company's case was *per curiam* and as follows:

> "The record of this case is similar to that in Alexander J. Cassett *et al.*, plaintiffs-in-error, *vs.* Mitchell Coal & Coke Company, defendant-in-error, decided at this term. The same questions of law are presented. The opinion in that case controls the decision of this. The motion to dismiss the writ of error is denied and the judgment of the Circuit Court is reversed with costs" (Record, p. 25).

Judgment in accordance therewith was entered on January 7, 1907 (Record, p. 42).

On the petition of the Webster Coal & Coke Company on April 29, 1907, a writ of certiorari was awarded to bring to the Supreme Court of the United States the said judgment and transcript of the record and proceedings of the Circuit Court of Appeals for the Third Circuit, and on the further petition of said Webster Coal & Coke Company, verified May 8, 1907, an order was made directing that the cause be advanced on the docket for argument at October Term, 1907.

ARGUMENT.

I.

The Circuit Court of Appeals had no power to review the order of the lower court.

The order granted below was not "a collateral matter distinct from the general subject of litigation affecting only the parties to the particular controversy, and finally settling the controversy," such as was referred to in *Brush Electric Company* vs. *Electric Improvement Company*, 51 Fed., 557. The order had distinct and important bearing on the general subject of the litigation, and affected the plaintiff and defendant in the principal case rather than the parties to the particular controversy. In fact, it did not affect the defendants in certiorari as individuals at all, the order being directed against them in their representative capacities. If the penalty prescribed in Section 724 for disobedience of the order is not exclusive and the Court has power to punish disobedience or enforce compliance, then, under the authority of *Alexander* vs. *United States*, 201 U. S., 117, the order, prior to such action on the part of the court, is interlocutory in the principal suit.

On the other hand, if the penalty be considered exclusive, then the order, so far as concerns the defendants in certiorari, was mere *fulmen brutum* and they were in no way aggrieved. Still further, the order was rendered in a proceeding for the protection of the rights of the party to the suit for whose benefit it was made and for that reason not reviewable.

Doyle vs. *London Guarantee Co.*, 204 U. S., 599.

II.

The order was properly directed against the officers and agents of the defendant.

A corporation can act and its obedience be compelled only by and through the individuals representing it. Section 724 is silent as to the form that the mandate of the court shall take. There is the broad provision that the courts may "require" a party to produce books or writings in its possession or power. How more effectually can the court "require" a corporation to produce books and writings than by an order directed to those through whom it must act?

As was said by this court in *Nelson* vs. *United States*, 201 U. S., 92, 115:

> "It is as useless as attempting to demonstrate that twice two make four, to say that a corporation can have possession of nothing except by the human beings who are its officers, and it is to them, not the intangible being they represent and act for, that the law directs its process of subpœna and must procure its evidence."

In reply to the argument of counsel for defendants in certiorari that the persons named in the order might cease to be officers or agents of the company before the return day of the order and thereby subject the defendant corporation to judgment by default, it is sufficient to say that the penalty of Section 724 does not follow as of course, but can be enforced only in the discretion of the Court, on further motion, where all matters in excuse or extenuation of non-compliance with the order would properly be presented.

The two cases cited by the Court below in support of its position that the order should have

been directed to the defendant *co nomine* instead of to its officers and agents are *Rose* vs. *King*, 5 S. & R., 421, and *Ridgeley* vs. *Richard*, 130 Fed., 387.

In *Rose* vs. *King*, the order was directed to one Huling, who was the agent of individual plaintiffs, and it was not disclosed whether the paper called for was in the possession of Huling as agent or as owner. In *Ridgely* vs. *Richard*, the application was for an order directing the defendant to produce the books and papers of a corporation which was not a party to the action, but of which one of the defendants was an officer.

It is submitted that neither of these cases is in point and that both the nature and effect of an order directing the officers and agents of a corporation to produce its books and papers is that of an order against the corporation itself.

III.

Section 724 authorizes, in an appropriate case, an order for the production of books and papers before trial.

Such has been the almost uniform practice of the Courts.

The cases are reviewed at length in *Bloede* vs. *Joseph Bancroft & Sons Co.*, 98 Fed., 175. Judge Bradford there states that diligent search had failed to disclose any authorities against the proposition except *Iasigi* vs. *Brown*, Fed. Cas. No. 6,993, and *U. S.* vs. *National Lead Co.*, 75 Fed., 94.

Iasigi vs. *Brown* was decided by Mr. Justice Curtis in 1853, the action having been brought in the Circuit Court for the District of Massachusetts. His opinion was quite brief, and there was no citation of any authority. In a subsequent case in

the same district, *Merchants' National Bank* vs. *State National Bank*, Fed. Cas. 9,448, decided in 1868, Mr. Justice Clifford, in commenting on the scope of the section, said:

> "No doubt is entertained that the motion may be made in a pending action at law before the day of trial; but the requirement of the order of the Court must *perhaps* be that the books and writings be produced at the trial of the action. * * * Production before the trial is not *perhaps* contemplated by the words of the provision, nor is it in general necessary."

The italics are ours.

The views of Mr. Justice Clifford and Mr. Justice Curtis on this point were considered by Judge Putnam in *Caspary* vs. *Carter*, 84 Fed., 416, in the said circuit, to be in conflict. Judge Putnam said:

> "We are not required under the circumstances to determine whether production can be compelled before trial; but Mr. Justice Curtis and Mr. Justice Clifford apparently differ on this point, as shown by the cases cited."

In the other case, *U. S.* vs. *National Lead Co.*, which was an action brought in the Circuit Court for the District of New Jersey, the question appears to have been only superficially considered. Judge Green there said:

> "But by the very words of the statute the exercise of the power vested in the Federal courts to require production of such books or writings is limited to causing such production to be made at the trial. The words are not broadly 'in any action at law at any time' the Court may require the production of books, but there is an express limitation found in the words 'on the trial of any action.' It is then, at that particular time—

> at the trial, and at no other time—that the Court may, in its discretion, order books to be produced. • • • The words of the statute are so clear that no construction other than this obvious one could be made."

The trouble with this reasoning is that Judge Green was not construing the words of the statute. The statute reads "in the trial of actions at law" and not "on the trial of any action;" and in this connection it is instructive to note the use in the statute of the preposition "in" instead of "at" or "on," which would naturally have been used had it been intended to limit the statute in that regard. Also, no one has questioned that a motion to produce may be made before the day of trial, yet if "in" meant "at," then the motion could only be made "at" the trial, for the section reads "In the trial of actions at law, the courts may, on motion," etc.

Judge Lanning, writing the prevailing opinion in the case below, observes that in the opinion in *Blocde* vs. *Joseph Bancroft & Sons Co.* there is no reference to *Bas* vs. *Steel*, Fed. Cas. No. 1088, or to *Dunham* vs. *Riley*, Fed. Cas. No. 4155. There was no occasion for any such reference, for in both *Bas* vs. *Steel* and *Dunham* vs. *Riley* the application was for the production of books and papers at the trial, and the question as to whether or not the section authorizes the production before trial was not considered in either case. Judge Lanning seems to have reached his conclusion that Section 724 does not confer power to require a party to produce books or papers before trial upon the theory that an order to produce before the trial constitutes in common law no part of the record of the action and cannot be excepted to, and therefore that if judgment should be entered against a party because of his failure so to produce, the judgment would necessarily be reversed on error for want of

a record to support it. This reasoning of the learned judge would be equally applicable in the case of an order to produce at the trial, for in either case, in the event of disobedience of the order, the remedy of the party aggrieved is the same—a further motion for judgment because of non-compliance. It is submitted, also, that whether or not the penalty provided in the section can be enforced in a particular case is not determinative of what is authorized by the section.

The reasoning of the section is all in favor of plaintiff's contention. As was expressed by Judge Bradford in *Blocde* vs. *Joseph Bancroft & Sons Co.*:

> "The statute, however, is remedial and as such entitled to a liberal construction. It provides for the production of books or writings 'in cases and under circumstances' where the parties 'might be compelled to produce the same by the ordinary rules of proceeding in chancery.' * * * It is, and was at and prior to the time of the passage of the judiciary act, within the settled jurisdiction of chancery and a usual practice to order production before trial of an action at law of documents containing pertinent evidence for inspection by a party having the requisite interest therein and desiring to use the same in preparing himself for trial.
>
> It must be assumed that Congress in passing the judiciary act was aware that the 'circumstances' under which production might be compelled in chancery embraced cases where the purpose of the party applying was to inspect, examine and take copies of the books or writings before the trial of an action at law in order to prepare for such trial. It is reasonable, then, to conclude that the statute authorizes the Court in actions at law to order production for inspection, after issue joined, in all cases and under all circumstances where it might have been ordered in chancery in aid of parties to such actions, and that this Court sitting

as a court of law can in such actions under pain of non-suit or default enforce the production of books or writings to the same extent and for the same purposes as when sitting as a court of equity, and compelling production in aid of such actions. Unless the terms 'in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery' are to be wrested from their natural meaning, it is difficult to perceive that production before trial is not equally with production at the trial within the scope of the provision. There is no sufficient warrant for an assumption that Congress intended that production of books and writings for inspection should be had only at the trial. Such a practice would, in many instances, be inconvenient, dilatory and expensive, with nothing to justify it, leading to postponements to allow time for inspection and calculated to embarrass or defeat the due administration of justice."

Blondie vs. *Joseph Bancroft & Sons Co.* has been followed in *Newgold* vs. *American Novelty & Mfg. Co.*, 108 Fed. Rep., 341; *Grey* vs. *Schneider*, 119 Fed., 474; and *Cameron Lumber Co.* vs. *Droney*, 132 Fed., 304.

IV.

The case is one in which the order might have been granted under the ordinary rules of proceeding in chancery.

1. *The action is not one for a penalty.* Section 8 of the Act to Regulate Commerce, on which this action is based, is as follows:

"§ 8. LIABILITY OF CARRIER IN DAMAGES. —That in case any common carrier subject

> to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

An action under this section has been termed in *Parsons* vs. *Chicago & Northwestern Railway Co.*, 167 U. S., 447, an action "to enforce what is in its nature a penalty." The distinction, however, between such an action and one to recover a penalty is pointed out in *Huntington* vs. *Attrill*, 146 U. S., 657, and we quote somewhat at length from the opinion in that case:

> "Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
>
> The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be 'penal against the hundred, but certainly remedial as to the sufferer.' *Hyde* vs. *Cogan*, 2 Doug., 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other

person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. *Bones* v. *Booth*, 2 W. Bl., 1226; *Brandon* vs. *Pate*, 2 H. Bl., 308; *Grace* v. *McElroy*, 1 Allen, 563; *Read* v. *Stewart*, 129 Mass., 407, 410; *Cole* v. *Groves*, 134 Mass., 471. As said by Mr. Justice Ashurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, 'It has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action.' *Woodgate* v. *Knatchbull*, 2 T. R., 148, 154; *Read* v. *Chelmsford*, 16 Pick., 128, 132. Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be 'not like a penal law where a punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty, but it is to the party grieved.' *Lake* v. *Smith*, 1 Bos. & Pul. (N. R.), 174, 179, 180, 181; *Wilkinson* v. *Colley*, 5 Burrow, 2694, 2698. So in an action given by statute to a traveller injured through a defect in a highway, for double damages against the town, it was held unnecessary to aver that the facts constituted an offence, or to conclude against the form of the statute, because, as Chief Justice Shaw said: 'The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity.' *Reed* v. *Northfield*, 13 Pick., 94, 100, 101."

Huntington vs. *Attrill* was followed in *Brady* vs. *Daly*, 175 U. S., 148, where the Court, in passing upon Section 4966 of the Revised Statutes: "Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum not less than $100 for the first and $50 for every subsequent performance as to the Court shall appear just," said:

> "The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, 'liable for damages therefor' * * * It has nothing in the nature of a *qui tam* action about it, and we think it provides for the recovery of neither penalty nor forfeiture."

In *City of Atlanta* vs. *Chattanooga Foundry & Pipe Works*, 127 Fed., 23, decided by the Circuit Court of Appeals for the Sixth Circuit and affirmed by this Court in 203 U. S., 390, the action was to recover damages under the seventh section of the act of Congress of July 2, 1890, Chapter 647, the so-called Sherman Act. The first three sections of the act are penal beyond question. They forbid certain contracts and combinations and provide that persons violating the same shall be deemed guilty of a misdemeanor and subject to punishment by both fine and imprisonment. The seventh section of the act, under which action was brought by the City of Atlanta, provides that any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the act, may sue therefor and recover threefold the damages by him

sustained and the costs of the suit, including a reasonable attorney's fee. It was held that the action did not fall within Revised Statutes, §1047, limiting to five years any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States"; and Judge Lurton, in writing the opinion of the Circuit Court of Appeals, said (p. 29):

> "The remedy is not given to the public, for no one may bring the action save the person 'who shall be injured.' etc., and the recovery is for the sole benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action a penal action within the meaning of Section 1047, Revised Statutes."

Finch v. *Rikeman*, 2 Blatch., 301, cited by plaintiffs in certiorari, was an action brought to recover damages for infringement of patents, and Betts, *J.*, there said:

> "The effect of the evidence sought for will be not only to enable plaintiff to recover his entire damages, but its direct consequence will be to subject the defendants to a penalty of three times the amount of those damages under Section 14 of the Act of July 4, 1836 (5 Stat. at Large, 123). I think it against the rules of equity to allow a bill of discovery in such a case unless the bill relinquishes all claim to the penalty which may be superinduced by the production and exhibition of the books, and, for that cause the motion must be denied."

This case must be considered overruled by *City of Atlanta* v. *Chattanooga Foundry and Pipe Works*, but in any event does not support the contention of defendants in certiorari, for in the case at bar recovery is for the sole benefit of the person injured and is limited to the actual damages sustained.

The effect of those other portions of the Act to Regulate Commerce which provide for the recovery of fines at the suit of the Government will be considered hereinafter, but we submit that in itself considered this action is not of such a nature that an application for discovery therein would have been repugnant to the rules of chancery.

2. *Defendants in certiorari will not be heard to say that the discovery might subject them to criminal prosecution or to a penalty or forfeiture.*

By Section 3 of "An Act to Regulate Commerce with Foreign Nations and among the States," enacted February 19, 1903 (32 Stat., 848), it is provided that,

> "in proceedings under this act and the acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation from producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or

> thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceeding."

And in the Act of February 25, 1903 (32 Stat., 904), making appropriation of certain moneys for the enforcement of the provisions of the "Act to Regulate Commerce" and of the "Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," it is provided that

> "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or transaction under said acts."

These provisions afford defendants in certiorari complete immunity from any liability at the suit of the Government under other sections of the Act to Regulate Commerce because of their testimony in this action, and neither the Fifth nor the Fourth amendment to the Constitution applies.

Hale vs. *Henkel*, 201 U. S., 43;
McAlister vs. *Henkel*, 201 U. S., 90.

Neither does the chancery rule that a bill of discovery will not lie in a case which involves a penalty or forfeiture apply, for this so-termed "pardon in advance" brings the case within the well-recognized exceptions:

> "If the prosecution to which the party might be exposed, or his liability to a penalty or forfeiture, is barred by lapse of time; or if the offence has been pardoned; or if the penalty or forfeiture is expressly waived in the bill, and the plaintiff is the person who is entitled to the advantage of the penalty, or of the forfeiture to which the defendant would render himself liable by making the

discovery; or if in any other way the reason of the rule as to exemption from discovery fails, the party interrogated is bound to answer."

Kerr on Discovery, p. 153;
Reg. vs. *Boyes*, 1 B. & S., 311;
Corporation of Trinity House vs. *Burge*, 2 Simons' Ch., 411;
Skinner vs. *Judson*, 8 Conn., 527;
McCreery vs. *Ghormley*, 6 N. Y. App. Div., 170;
Brown vs. *Walker*, 161 U. S., 591, 598.

3. *Defendants in certiorari cannot set up any privilege of the Pennsylvania Railroad Company as against their testimony or the production of the railroad company's books.*

In *The King of the Two Sicilies* vs. *Willcox*, 1 Simons' Ch., N. S., 301, 329, the defendants resisted discovery on the ground that the production of the papers might incriminate the persons for whom they had been acting as agents. The plea was overruled and the Court said:

"The defendants, it will be observed, say that the production of the documents might subject certain persons in Sicily as well as themselves, to highly penal consequences. It is hardly necessary to say that so far as the objection relates to the consequences which the discovery might entail on others, it would not hold even if the penalties would be incurred in this country. The privilege is confined to penal consequences likely to be occasioned to the party himself; *Nemo tenetur seipsum prodere;* but there is no privilege against disclosing matter within the knowledge of the party merely because it might subject other persons to punishment."

In *McAlister* vs. *Henkel*, *supra*, it is said:

"Indeed, the authorities are numerous to the effect that an officer of a corporation can-

> not set up the privilege of a corporation as against his testimony or the production of their books."

And in *Nelson* vs. *United States*, 201 U. S., 92, 115:

> "Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs."

4. *Conceding that defendants in certiorari are entitled to assert the rights of the defendant corporation with respect to the production of its books and papers, such defendant is not entitled to the privilege.*

(*a*) Congress has expressly provided that a defendant in an action for damages under Section 8 of the Act to Regulate Commerce may be compelled to produce its books and papers.

Section 9 of the Act to Regulate Commerce is as follows:

> "In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

The case at bar thus falls within the exception to the chancery rule noted by *Kerr on Discovery*, p. 154, as follows:

> "The legislature has in some cases expressly provided that parties to transactions

> rendered illegal by statute shall be compelled to answer bills in equity for the discovery of such transactions; in such cases, therefore, the defendant cannot protect himself from the discovery required, on the ground that it will render him liable to the penalties imposed by the statute itself."

In *Enc. of Plead. & Prac.*, Vol. 6, p. 746, the exception is stated thus:

> "The rule that a defendant need not discover matters which would convict him of crime, or have a tendency thereto, is inapplicable when there are statutory enactments specially providing that his answer shall not be used against him in a criminal prosecution."

The application of this doctrine in chancery practice will be found in *Perrine* vs. *Striker*, 7 Paige, 598; *Siffkin* vs. *Manning*, 4 Edw. Ch., 37; *Rose* vs. *Savings Fund*, 6 Phil., 10; *Philadelphia* vs. *Keyser*, 10 Phil., 50.

In *Perrine* vs. *Striker* it was sought to compel a usurer to answer under oath as to his usury under the provisions of Chapter 430 of the Laws of 1837, entitled "*An act to prevent usury.*" By Section 6 of the act, offenders against the statute were declared to be guilty of a misdemeanor and punishable by fine or imprisonment, or both. By Sections 3 and 8 it was provided that such offenders might be compelled to answer on oath any bill exhibited against them in the Court of Chancery for relief, or discovery, or both, but that the testimony so given should "not be used against such person before any grand jury, or on the trial of any indictment against such person." The Chancellor said:

> "The objection that the discovery sought by the bill may subject the defendant to a criminal prosecution is not well taken. The eighth section of the act of May, 1837, to prevent usury expressly provides that the an-

> swer of a defendant in such a case shall not be used against him before any grand jury, or on the trial of any indictment against him. Whether any criminal prosecution can be instituted in any other form against the usurer it is not material to inquire; for the legitimate construction of this section must be, although the word indictment only is used, that his answer shall not be received as evidence on the trial of any criminal prosecution against him."

Siffkin vs. *Manning* was a bill for discovery and relief to get back goods obtained by fraud. The Vice-Chancellor said:

> "I think the statute to compel defendants to answer bills in this court in certain cases where they might otherwise be exempt, Session Laws, 1833, p. 17, applies to this case. Among other things, a defendant shall be compelled to answer 'where the defendant shall be charged with any fraud whatever affecting the right or property of others.' The obtaining goods by false pretences which may subject the party to an indictment is obtaining them by fraud; and though he must answer in relation to the fraud or false pretences, yet the statute forbids any use being made of his answer as evidence against him on any complaint, or on the trial of an indictment for the fraud. This is all the protection that justice requires he should have."

In Rose *vs.* Savings Fund discovery was sought under a statute (Act of March 31, 1860, § 123), which provided:

> "No such trustee, merchant, attorney, broker, agent, director, officer or member as aforesaid shall be enabled or entitled to refuse to make complete discovery, by answer, to any bill in equity or to answer any question or interrogatory in any civil proceeding or in any court of law or equity. But no such answer to any such bill, question or

> interrogatory shall be admissible in evidence against such person charged with any such misdemeanors."

The Court ruled that the defendant should answer, and said:

> "But the 114th section of that act wisely obviates the objection behind which the defendants have taken shelter; that the civil injury for which complainants are seeking to obtain redress here is also an offence under the criminal law; by providing that 'no such answer to any such bill, question or interrogatory shall be admissible in evidence against such person charged with any such misdemeanors.' This brings the rule exactly to the point where it ought to be, and is decisive against the ground taken by the defendants in their demurrer."

A like ruling was made under the same statute in *Philadelphia* vs. *Keyser*.

It is true that the immunity statutes do not apply in favor of a corporation (*Hale* vs. *Henkel*), but if that distinction be important the corporation itself is protected to the extent required in chancery practice under the authorities above cited by the provisions of Section 860 of the Revised Statutes:

> "No pleading of a party nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture."

It will be seen that this exemption runs in favor of a party and therefore includes the defendant corporation. The exemption afforded, that the discovery shall not be given in evidence or in any man-

ner used against the party in any criminal proceeding or for the enforcement of any penalty or forfeiture, is precisely within the immunity provisions considered in Perrine *vs.* Striker, and other cases above considered.

It is not overlooked that this Court in *Counselman* vs. *Hitchcock*, 142 U. S., 547, held that the protection afforded by Section 860 is not co-extensive with the Fifth amendment, but we have already seen that the Fifth amendment does not apply in favor of corporations, so that the reason for applying the strict construction there used fails. As the Court said in the Counselman case:

> "Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

And again:

> "It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him."

Inasmuch as the Fifth amendment does not apply in favor of a corporation, the rule to be observed is the same as if the Fifth amendment had been as thus suggested.

(*b.*) There is no reasonable ground to apprehend danger of a suit by the government based on evidence to which the discovery herein sought might lead.

The books and records called for under the order to produce contain, in all probability, and so far as can now be foreseen, all of the documentary evidence in the possession or under the control of the defendant corporation. The statute of limitations (Revised Statutes, § 1047) will bar any prosecution for a fine long before this case reaches its final adjudication. The danger of a suit by the Government is remote and imaginary and can be invoked, if at all, only to defeat the broad public policy which the Congress has said shall prevail.

In *Regina* vs. *Boyes*, 1 Best & Smith, 311, a witness who was guilty of bribery had been pardoned under the Great Seal, but under the Act of Settlement such pardon could not be pleaded in bar to an impeachment by the House of Commons. In passing on this plea as a bar to discovery, Lord Chief Justice Cockburn said:

> "To entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend danger to the witness from his being compelled to answer. * * * Further than this, we are of opinion that the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, and having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a mere remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford a party, called upon to give evidence in a proceeding *inter alios*, protec-

> tion against being brought by means of his own evidence within the penalties of the law. But it would be to turn a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. * * *
>
> It appears to us, therefore, that the witness in this case was not in a rational point of view in the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings; and that it was therefore the duty of the presiding judge to compel him to answer."

Dummer vs. *Corporation of Chippenham*, 14 Vesey, 245, was a case involving a conspiracy to remove the plaintiff from office. Plaintiff's right to a discovery was upheld by Lord Eldon, who said:

> "Supposing this bill true, there will be a gross failure of justice if the plaintiff cannot have a discovery of the matters charged. If the principle of convenience and inconvenience pointed out by Lord Talbot, and the notion that by allowing that demurrer there would be a failure of justice, were properly applied in that case, of an officer, why should they not be applied in each case to determine whether the court is authorized to call for an answer? If such a transaction as this can take place and there is no remedy, the consequence is inevitable that every corporation, a trustee for charitable purposes, will have the power of eluding entirely the jurisdiction over charitable subjects. Upon the particular circumstances, therefore, of this case, and without reference to any other case, the assigned cause of demurrer will not do."

And in commenting on the Counselman case, this Court, in *Brown* vs. *Walker,* 161 U. S., 591, 600, gave expression to like views:

> "The danger of extending the principle announced in Counselman *vs.* Hitchcock is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger."

(*c.*) The defendant corporation cannot claim immunity under the Fourth Amendment.

The order below was for the production of certain specified books and papers and takes the place of a *subpœna duces tecum.* There is no element in this of an unreasonable search or seizure. In *Hale* v. *Henkel,* the Court said:

> "We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpœna duces tecum,* the production, upon a trial in court, of documentary evidence. * * * *
>
> "Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of the corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment."

And in the concurring opinion of Mr. Justice Harlan:

> "It seems to me that the witness was not entitled to assert, as a reason for not obeying the order of the court, that the *subpœna duces tecum* was an infringement of the Fourth Amendment, which declares that 'the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not

> be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.' * * * In my opinion, a corporation—'an artificial being, invisible, intangible and existing only in the contemplation of law'—cannot claim the immunity given by the Fourth Amendment; for it is not a part of the "People" within the meaning of that amendment, nor is it embraced by the word "persons" in the amendment."

Mr. Justice Harlan followed up this reasoning in Western Turf Association *vs.* Greenberg, 204 U. S., 359, in a construction of the Fourteenth Amendment, holding that a corporation cannot be deemed a citizen within the meaning of the clause "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Hale vs. *Henkel* was followed on the point under discussion in *In re Consolidated Rendering Company*, decided by the Supreme Court of Vermont in May, 1907 (66 Atl. Rep., 790), where a statute of the State was upheld which provided that a corporation doing business therein should on due notice "produce before any court, grand jury, tribunal or commission acting under the authority of this State all of the books, documents, correspondence, memoranda, papers and data which may contain any account of, reference to, or information concerning, the suit, proceeding, action, charge or subject of inquiry pending before or to be heard or determined by such court, grand jury, tribunal or commission, and which have at any time been made or kept within the State of Vermont and are in the custody or control of such corporation within this State or elsewhere at the time of such notice upon it."

V.

Even if it should be held that the case is not one in which under the ordinary rules of proceeding in chancery discovery might have been compelled, yet the order should be sustained under Section 9 of the act to regulate commerce.

While the plaintiff sought to take advantage of Section 724 in order that on non-compliance the defendant might be subject to judgment by default, yet the order itself (Record, pp. 19-21) makes no reference to Section 724, and this Court can look to the express terms of the statute to uphold the order granted below.

Nothing could be plainer than the provisions of Section 9 upon this point:

> "In any such action brought for the recovery of damages the court before which the same shall be pending * * * may compel the production of the books and papers of such corporation or company party to any such suit."

This plainly authorizes an order for the production of books and papers before trial, for the language "in any such action" is even broader than the language of Section 724 "in the trial of actions at law."

VI.

The judgment of the Circuit Court of Appeals should be reversed.

JOHN W. GRIGGS,
BENJAMIN S. HARMON,
GEORGE S. GRAHAM,
DAVID L. KREBS,
Counsel for Plaintiff in Certiorari.

No. . OCTOBER TERM, 1906.

284.

No. [redacted]

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

Office Supreme Court, U. S.
FILED
APR 20 1907
JAMES H. McKENNEY,
CLERK.

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Roberts, and R. L. Head, Plaintiffs in Error,

vs.

Pennsylvania Coal and Coke Company, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF PLAINTIFFS IN ERROR

JOHN G. JOHNSON,
Counsel for Plaintiffs in Error.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Pennsylvania Coal and Coke Company, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF PLAINTIFFS IN ERROR.

I. STATEMENT OF THE CASE.

The Pennsylvania Coal and Coke Company, the defendant in error, instituted as action of *assumpsit* in the Circuit Court of the United States for the Eastern District of Pennsylvania against The Pennsylvania Railroad Company to recover damages for an alleged violation, between May 1st, 1902, and November 4th, 1904, of the Interstate Commerce

Act, (1) by reason of an alleged discrimination in favor of other coal shippers and against the Pennsylvania Coal and Coke Company in the number of cars furnished the Pennsylvania Coal and Coke Company for the transportation of its product to market, and (2) by reason of an alleged payment by The Pennsylvania Railroad Company of certain alleged rebates or drawbacks to the Altoona Coal and Coke Company and the Glenn White Coal and Lumber Company for transporting, at their own expense, upon lines of railroad, the coal from their mines to the main line of The Pennsylvania Railroad Company (Record, page 5-8). The Pennsylvania Railroad Company pleaded "Not guilty." Prior to the trial of the cause, to wit, on April 12th, 1906, upon an application and motion (Record, page 14-18) of the Pennsylvania Coal and Coke Company, and after answer filed by the Railroad Company denying the power of the court in this proceeding to make the order prayed for (Record, page 20-21), the court made an order (Record, page 22-23) upon the plaintiffs in error, all of whom were officers or employees of the Railroad Company, directing them, prior to the trial of the case, to produce and submit to the examination of the Pennsylvania Coal and Coke Company, their agents, accountants, and attorneys, the so-called "Daily Distribution Sheets" and certain other orders and papers belonging to the Railroad Company, dealing with the distribution of coal cars by the Railroad company between the periods embraced within the plaintiff's statement of claim. To this order of the court the plaintiffs in error filed exceptions, and prayed for and were allowed this writ of error.

II. Specification of Errors.

1. The Circuit Court erred in entering the order and decree of April 12th, 1906, requiring the plaintiffs in error to submit to the inspection of the plaintiff, and its counsel,

prior to the trial of the said cause, the books, records and papers referred to in said order.

2. The Circuit Court erred in entering the order and decree of April 12th, 1906, requiring the plaintiffs in error to produce at the trial of the cause the books, records and papers referred to in the said order.

III. Argument.

The question involved in this case is as to the power of a Circuit Court of the United States in an action for alleged violation of Sections 2 and 3 of the Interstate Commerce Act, (Act of Congress of February 13th, 1887), to enter an order against individuals who are officers of the defendant railroad company compelling such individuals to produce, prior to the trial of the cause, and submit to the examination by the plaintiff and its agents, books and writing belonging to the defendant Company, which are in the possession of such company.

(*a.*) The order of the court below is claimed to be justified by Section 724 of the Revised Statutes, which provides as follows:—

> "Power to Order Production of Books and Writings in Action at Law.
>
> "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books of writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him in default."

It is submitted that this section of the Revised Statutes does not justify the order in question, and that the same, under the circumstances of this case, is open to three fatal objections.

1. The order is directed to and against individuals and not to and against a party to the cause, as required by Section 724.

2. The action in which the order complained of was entered is a penal action, and therefore Section 724 is not applicable.

3. Section 724 does not authorize an order for production of books and papers prior to the trial of the cause.

4. The car distribution orders of the Defendant whose production is ordered by the court below do not contain evidence pertinent to the issue.

1. The order is directed to and against individuals and not to and against a party to the cause as required by Section 724, of the Revised Statutes.

Under Section 724 of the Revised Statutes, the court is only authorized to require *the parties* to produce books or writings in their possession or power and the penalty for a non-compliance with the order on the part of the defendant is the entry of a judgment against him by default. The plaintiffs in error, though they were officers and employees of the defendant company, are not parties to the suit, and therefore the court had no power to enter such an order against them. Otherwise, the court might enter judgment by default against a defendant upon a non-compliance by third persons, who had ceased to be employees of the defendant company, with an order made against such persons. Suppose the plaintiffs in error had resigned from the Railroad Company the day the order was entered, their power and control over the books of the Railroad Company would have ceased the moment they

resigned, and upon such resignation they might have ceased to have the slightest interest, direct or indirect, with the affairs of the Company, and yet the court would be authorized to enter judgment against the Company by reason of a failure on the part of the persons now perfect strangers to the Company to comply with the order. The mere fact that the plaintiffs in error happened to be occupying important positions in the Railroad Company cannot affect the principle, for it is perfectly conceivable that an order of this kind might be entered against the humblest employee even though he only were employed from day to day.

Furthermore, the penalty prescribed by Sec. 724, for a non-compliance with an order granted thereunder, is conclusive as against the validity of an order directed not to a party to the cause, but to third persons, even though they be such party's agents. It is monstrous to assume that the severe penalty of judgment by default may be entered against a defendant by reason of the failure of his bookkeeper to comply with an order directed to such bookkeeper. Yet that is what the practice sanctioned by the order of the court below amounts to.

The illegality of such an order directed to an agent of a party to the cause has been flatly settled by a decision of the Supreme Court in Pennsylvania in Rose *vs.* King, 5 S. & R. 241. There is a statute in Pennsylvania, viz., the act of February 27th, 1798, (3 Sm. Laws, 303), which was founded upon and is almost identical with the provisions of Sec. 724 of the Revised Statutes. (Opinion of Mitchell J. in Moelling *vs.* L. C. & N. Co., 9 Phila., 324.) The Pennsylvania Statute provides as follows:—

"The Supreme Court, and several courts of common pleas in this state, shall have power, in any action pending before them, on motion, and upon good and sufficient cause shown, by affidavit or affirmation, and due notice thereof being given, to require the parties, or either of them, to produce books or writing in their possession or power, which contain evidence pertinent to the issue; and if either

party shall fail to comply with such order, and to produce such books or writings, or to satisfy said courts why the same is not in the party's power so to do, it shall be lawful for the said courts, if the party so refusing shall be a plaintiff, to give judgment for the defendant as in cases of non-suit, and if a defendant to give judgment against him or her by default, as far as relates to such parts of the Plaintiff's or Plaintiffs' demand, or the Defendant's or Defendants' defence, to which the books or papers of the party is alleged to apply."

In Rose *vs.* King, the lower court made (under the provisions of the Act of 1798) an order upon an agent of the Plaintiff for the production of certain papers at the trial of the Cause. Upon a non-compliance with the order, the penalty prescribed by the Act of 1798, viz., a non-suit was enforced, which was reversed by the Supreme Court of Pennsylvania on the ground that under the act of 1798, the order was defective if directed to a third person, even though he be an agent of a party to the record. Mr. Justice Gibson, saying:—

"The affidavit is also defective, in not alleging that the deed was in possession of the plaintiffs. It was seen in the possession of Seely Huling, who was an agent of the Plaintiffs; but whether as an agent or as the owner of it, and if the former, whether it remained in his possession at the time of its application, does not appear. If it were Seely Huling's own, or not entrusted to his care by the Plaintiffs, it would not be peculiarly in their power; and, of course its production could not be enforced under the Act; but the party wishing to use it, would have to resort to the usual means of a subpœna with a *duces tecum*. The notice was served also at a period altogether too late, being only three days previously to the granting of the rule; and the rule itself was wrong, being made not only during the trial, but personally on Seely Huling, who was at most but an agent; it should have been on the Plaintiffs in the cause. *A Court has no right to designate a third person, not marked as such on the record, as the real party, and*

proceed against him: It is the Plaintiff of record who is to be nonsuited, and the rule must be against him. It was unnecessary to treat Seely Huling as the party; if he were in fact so, the production of the paper might have been procured by a rule on the plaintiffs of record, which would have given the defendants all the benefit they were entitled to in any shape. If the paper came to his possession as an agent, it was to be considered in the power of the plaintiffs for all purposes beneficial to the defendants, in a proceeding on the act; if it were his own, he would, even though substantially interested, be bound to produce it on a subpoena."

So also in Ridgely *vs.* Richard, 130 Fed., 387, an application was made under Section 724, to compel one of the defendants, who is also an officer of a corporation not a party to the cause, to produce the papers of such other corporation. The court declined to make the order upon the ground that such corporation was not a party to the action.

It is no answer to the authority of these cases to refer to the practice in equity of making the officers of a corporation parties defendant to a bill of discovery against the corporation. The reason for such a practice was that a corporation answers under seal and not under oath, and therefore to obtain discovery under oath it is necessary to join as co-defendants the officers of the defendant corporation. (Cyc. of Law and Practice, Vol. XVI., page 311; Hare on Discovery, page 83.) That principle has obviously no application to the question under consideration. What that plaintiff has asked for is not mere discovery under oath as to the contents of documents, but their actual production for the inspection of the plaintiff prior to trial and an order calling for such production may be made against the defendant company as well as against its officers and employees.

There cannot be any doubt therefore that an order of this character directed against employees of a party to the cause and not against such party itself is not authorized

by Section 724 or any other provision of the Revised Statutes.

2. The action in which the order complained of was entered is a penal action and therefore the remedy prescribed by Section 724 is not Applicable.

The power of the court to make an order of this kind is expressly limited by Section 724 to "cases and under circumstances where they (the parties) might be compelled to produce the same by the ordinary rules of proceeding in chancery."

It is, of course, elementary law that a defendant is protected from making discovery where the effect of which might be to subject him to criminal prosecution or to a penalty or a forfeiture. (Cyc. of Law and Practice, Vol. XIV., pages 333, 335; Hare on Discovery, page 131), and it was accordingly held in Newgold *vs.* American Novelty Co., 108 Fed. 341, that in a *qui tam* action to recover the penalty prescribed by Section 4901 of the Revised Statutes for falsely marking an article as patented, the defendant could not be compelled, under Section 724, to produce books or papers containing evidence against him either for use in evidence at the trial or for inspection of the plaintiff before the trial.

Brown, J., said:—

"The provision of Section 724 above quoted, expressly limits its application to cases and circumstances where the party "might be compelled to produce the books and papers by the ordinary rules of proceeding in chancery." But no such production as here sought would be required by the ordinary rules of proceeding in chancery for use in an action for penalties like the present. "It is a universal rule in equity," says Story, J., "never to enforce either a penalty or a forfeiture; and a bill of discovery will not lie in a case which involves a penalty or a forfeiture." So also, in Finch *vs.* Rikeman, 2 Blatch., 301, where an action was brought to recover damages for the infringement of a patent the

court refused to make an order (under Section 724) on the defendant to produce his books and papers, as the effect of the evidence would be to subject the defendant (under Section 14, of the Act of July 4, 1836) to a penalty of three times the amount of the damages suffered by the plaintiff. Betts, J., said:—

> "The relief proposed to suitors by that practice was, however, more especially defective in affording no summary sanction to an order to produce papers, which should apply to and affect the cause itself. The Act of Congress remedies this deficiency, by authorizing a final judgment or a judgment of non-suit, as the case may require, so that the rights of the party in the suit are made dependent on his compliance with the order against him to produce the books and papers. These are stringent conditions, and require from Courts a careful consideration of the provisions of the Act, before enforcing them. The plain limitation to the right to the interposition of this Court by giving final judgment, is, that the application by a party for the production of papers be one which a Court of Equity would sustain on a bill of discovery. The right, in our opinion, rests entirely on that condition.
>
> "This motion demands the production of defendants' books, to establish the quantity and value of the manufacturers of machinery made by the defendants, which manufacture is charged in the declaration to be an infringement of the plaintiff's patent. The effect of the evidence sought for will be not only to enable the plaintiff to recover his entire damages, but its direct consequence will be to subject the defendants to a penalty of three times the amount of those damages, under Sec. 14 of the Act of July 4th, 1836, (5 U. S. Stat. at Large, 123). We think it against the rules of Equity, to allow a bill of discovery in such a case, unless the bill relinquishes all claim to the penalty which may be superinduced by the production and exhibition of the books, and, for that cause, the motion must be denied."

This rule is not affected by the fact that the particular action in which the production of the books and papers

is sought is a civil one for damages. It is sufficient ground for declining to require the production of books and papers that such production might subject the defendant to a criminal prosecution.

In U. S. *vs.* National Lead Co., 75 Fed., 94, an action was brought by the United States to recover back certain drawbacks paid the defendant upon certain imports of raw material upon the allegation that the manufactured article was exported, which allegation was claimed to be false. A petition having been filed under Section 724 asking for the production of books and papers prior to trial the court held that the documents, if produced would tend to show the commission of a crime by the defendants, and that therefore no order for production should be made, Green, J., saying:—

> "But there is a more serious objection to the granting of this motion, and which is radical in its nature. Although the pending suit is, in terms, simply one to recover money had and received by the defendant to and for the use of the plaintiff, yet it is evident that the real gravamen of the action is the alleged fraud and misfeasance of the officers, agents, and servants of the defendant corporation, committed by them, or some of them, in the name and for the benefit of the corporation, in the making and presenting of false, deceitful, and fraudulent claims for drawbacks or rebates of duties on imported lead ore, and thus unlawfully obtaining the very large amounts of money involved in this suit. To obtain such rebates or drawbacks, the statute requires the claim to be verified by oath. This was done in the claim made by the defendant. If, therefore, the allegations of plaintiff are true, the officers and agents of the defendant corporation who were guilty of making these fraudulent claims have laid themselves open to criminal prosecution, and the corporation itself has become liable to the penalties and forfeitures affixed to such acts by the statute. Now, the plaintiff alleges that the evidence of these unlawful acts is to be found in the books of the defendant, and for that very reason asks for the order requiring their production. But because of that very reason the order asked for ought

not to be granted. It is not necessary to base the refusal to grant the order, under these circumstances, upon the protective clauses of the Constitution of the United States. Just, and in fact peremptory, reasons for such refusal are to be found clearly written in the statute, which confers upon the court the power sought to be invoked. Such power is, by the words of the statute, to be exercised only under circumstances where the parties might be compelled to produce the books and writings "by the ordinary rules of proceedings in chancery;" in other words, the order asked for is to be made only where circumstances would justify a discovery in proceedings in equity. This limitation upon the exercise of this power to require the production of books and writings absolutely bars the granting of the present motion, for it is a cardinal rule of chancery that a discovery will never be decreed when it might tend to convict the party of a crime or work a forfeiture of his property. Nor is this rule confined to cases in which discovery must necessarily subject the defendant to pain and penalties, but it is broadly extended to cases where it may do so. The discovery sought may, indeed, have no immediate tendency to criminate the defendant, but that does not militate against the enforcement of the rule that the defendant is not bound to accuse himself of crime, or to furnish any evidence whatever which shall lead to any accusation of that nature. I Daniell, Ch. Prac. 563; March *vs.* Marsh, 16 N. J. Eq. 391. As was tersely said by Mr. Justice Bradley in Boyd *vs.* U. S. 116 U. S., 616, 6 Sup. Ct. 524, in commenting upon this statute:

" 'Compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.'

"Hence it is clear that this statute, instead of authorizing the order asked for by the plaintiff, requires its denial. Equity has placed its veto upon such applications when made under circumstances which characterize this case,

> and, if equity would refuse to decree discovery, this court is powerless to order it to be made. The motion is denied, and the petition is dismissed.'

It is important to remember that the Plaintiff does not allege that the transportation rates charged it were unreasonable, but does allege that the Plaintiff has been discriminated against in its car supply and by the payment of certain alleged rebates to others in violation of sections 2 and 3, of the Interstate Commerce Act, which provides as follows:—

> "SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers, or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.
>
> "SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The right of action created by these sections and which the plaintiff seeks to enforce, is a right of action unknown at common law, and is the creation of a penal statute and therefore the plaintiff is not entitled to the remedy conferred by section 724. The obligation of the carrier at

common law was merely to charge each customer a reasonable rate. The doctrine that a carrier may not discriminate is a creation of statute, and so far as interstate commerce is concerned owes its entire life and being to the Interstate Commerce Act.

The rule at common law was thus stated by Byles, J., in Baxendale *vs.* Ry., 4 C. B. (N. S.) 63, when he said:—

> "I know of no common law reason why a carrier may not charge less than what is reasonable to one person or even carry for him free of all charge."

In the English notes to Coggs *vs.* Bernard, 1 Smith's Leading Cases 283, it is said with respect to the obligation of the common carrier at common law:—

> "The higher charge must be no more than a reasonable remuneration to the carrier, although at common law there is no liability to carry out equal rates for all customers."

In (1886) Menacho *vs.* Ward, 27 Fed. 529, Judge Wallace said:—

> "Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relation with the public."

So, also, in U. S. *vs.* D. L. & W. R. R. Co., 40 Fed. 101, Judge Wallace again said:—

> "By the common law, although public carriers are not permitted to make unreasonable discrimination in per-

forming the services which they undertake between those whom it is their duty to serve the discrimination which is unreasonable is such only as enures to the undue advantage of one person or class of persons in consequence of some injustice inflicted upon another. The carrier is not obliged to treat all who patronize it with absolute equality. Thus it is privileged to charge less than fair compensation to one person or to a class of persons and others can not justly complain so long as he carries on reasonable terms for them. *That privilege can no longer be exercised under the Interstate Commerce Act by the carriers subject to its provisions in the transportation of a like kind of traffic under substantially similar circumstances and conditions.* Again, it is no part of the common law obligation of railway companies to furnish the same facilities or instrumentalities of transportation to all alike, and while it is unquestionably their duty to furnish suitable and adequate facilities for all reasonable necessities of the business they engage in they may nevertheless choose their own appropriate means of carrier * * *. But the Interstate Commerce Act requires them to treat all impartially, and if one shipper is subjected to any undue or unreasonable prejudice or disadvantage because a railway company permits another shipper to use his own cars for carrying traffic over its road their right to choose their own appropriate lines of carriage is to that extent curtailed."

In I. C. C. *vs.* B. & O. R. R. Co., 145 U. S. 263, Mr. Justice Brown said:—

"Prior to the enactment of the Act of February 4, 1887, to Regulate Commerce, commonly known as the Interstate Commerce Act, railway traffic in this country was regulated by the principle of the common law applicable to common carriers which demanded little more than that they should carry for all persons who apply in the order in which the goods were delivered at the particular Station, *and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service.*"

That the Interstate Commerce Act is a penal statute has been flatly decided by the Supreme Court of the United States in Parson *vs.* Ry. Co., 167 U. S. 447, which was an action by a shipper against a railroad company for a violation of the Interstate Commerce Act in charging the plaintiff a concededly reasonable rate, but making a lower charge to other shippers under substantially similar circumstances and conditions. In delivering the unanimous opinion of the court that the plaintiff had failed to prove his case, Mr. Justice Brewer said:—

> "We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates charged for shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover money which inequitably and without full value given has been taken from him. He is only seeking to recover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant.
>
> "*Again, his cause of action is based entirely on a statute, and to enforce what is in its nature a penalty.* Suppose the officials of the defendant company had charged the plaintiff only a reasonable rate for his personal transportation from his home in Iowa to Chicago, and at the same time had, without any unjust occasion therefor, given to his neighbor across the street free transportation, thus being guilty of an act of favoritism and partiality—an act which tended to diminish the receipts of the railroad company, and to that extent the dividends to its stockholders—such partiality on their part would not, in the absence of a statute, have entitled the plaintiff to maintain an action for the recovery of the fare which he had paid, and thus to reduce still further the dividends to the stockholders. So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter

though it appeared that through any misconduct or partiality on the part of the railway officials shippers in Nebraska had been given a less rate.

"It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another. *But it is familiar law that no one who is seeking to recover a penalty is bound by the rule of strict proof.* Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act he must make a case showing not by way of inference but clearly and directly such violations. No violation of statute is to be presumed.

"The allegation is that this joint tariff was not filed with the commission, and not published at the Iowa stations from which plaintiff made his shipment, and that in consequence thereof he was ignorant of its rates. His argument practically is that if the tariff had been filed with the commission it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted he might have examined the rates and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff. But these 'might be's' interfere very materially with the line of sequence. He does not show that he had not already contracts with some consignee in Chicago, New Orleans or some place other than the four eastern points named in the tariff, for shipment to him of all grain at his command. He does not allege that he had or would have made any arrangements with any consignee in any of those points for the receipt and sale of his corn or even that the extra commissions there would not more than make the difference in rates. In short, he does not allege, either directly or indirectly, that if he had known of these rates he would have shipped his corn, under this tariff, to either of those points, but rests his contention upon the suggestion that the mere difference in the prices would naturally have caused him to ship to one or the other of them, and thus to take advantage of the joint tariff. Every fact which he alleges

might be absolutely and fully true, and yet he, with knowledge of the joint tariff, with the privilege of shipping under it, has never offered or sought to forward a single pound of corn to any other place than Chicago. *Sure it needs but the statement of this to show that he comes far short of that rule of strict proof which enables one to enforce a penalty for wrong:* for, if he would not under any circumstances have shipped to New York, was compelled by his contracts or any other consideration to ship to Chicago, he cannot say he was injured by his ignorance of the rate to New York. The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So, before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. *Penalties are not recoverable on mere possibilities.* We think, therefore, without attempting to take judicial knowledge of the general order made by the Interstate Commerce Commission in reference to the publication of joint tariffs, the plaintiff has failed in that full and clear showing of injury which is necessary in order to justify a recovery under the Interstate Commerce Act."

In Logan *vs.* R. R. Co., 132 Pa. St. 403, the plaintiffs brought an action for alleged discrimination in freight charges; the first count of their declaration embracing the amount of the discrimination in rate; the second count asking for treble damages under the provisions of the Pennsylvania Statute of June 4, 1883, P. L. 72, which provides as follows:

"Section 1. That any undue or unreasonable discrimination by any railroad company or other common carrier, or any officer, superintendent, manager, or agent thereof, in charges for or in facilities for the transportation of freight

within this State or coming from or going to any other State is hereby declared to be unlawful."

"Section 2. No railroad company or other common carrier engaged in the transportation of property, shall charge, demand or receive from any person, company or corporation, for the transportation of property, or for any other service, a greater sum than it shall charge or receive from any other person, company or corporation for a like service, from the same place, upon like conditions, and under similar circumstances; and all concessions in rates and drawbacks shall be allowed to all persons, companies or corporations alike, for such transportations and service, upon like conditions, under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals, or between individuals and transportation companies, or the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered."

The plaintiffs having made a motion for the production of books and papers by the defendant under the Act of February 27th, 1798, (3 Sm. Laws 303), the court refused the same upon the ground that the action was in substance an action for the recovery of a penalty. Plaintiffs then amended their declaration by adding a third count, which claimed the actual amount of difference in rate charged them between 1881 and 1886. Upon a re-argument as to their right under the third count to compel the production of books and papers by the defendant, the court held unanimously that no production could be had as to writings and papers showing or tending to show a discrimination subsequent to June 3d, 1883, the date of the passage of the Pennsylvania Statute, but that the production of books and papers could be decreed, which would show discrimination prior to the date of the passage of this statute.

In view of the provisions of the third count which claimed actual and not treble damages, both prior as well as sub-

sequent to the passage of the Act of June 4th, 1883, this case must have been decided upon the theory that where there is a statute which declares a particular transaction unlawful and also imposes an additional penalty for a violation thereof, and an action is brought for the actual damages resulting to the plaintiff from the violation of the statute, irrespective of the penalty, production of books and papers cannot be decreed, as the statute is fundamentally a penal one, irrespective of whether the action seeks to recover only a portion of the penalty.

Can any one read the penal provisions Sec. 10, of the Interstate Commerce Act and doubt that the Act is not only a penal statute, but also a criminal one?

> "SEC. 10 (as amended March 2, 1889). That any common carrier subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: Provided, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

And yet it is to establish a violation of such a statute by the Railroad Company that the Plaintiff asks for discovery from the officers and employees of the Railroad Company. There can be but one answer to that proposition, viz., that a Court of Equity would not decree discovery under such circumstances and accordingly a court of law authorized to require the production of books and papers "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery" will decline to compel under the circumstances of this case the production of such books and papers.

3. Section 724 does not authorize an order for the production of books and papers prior to the trial of the cause.

The decisions of the various circuits have varied with respect to this question. In U. S. *vs.* National Lead Company, 75 Fed. 94; Hyldon *vs.* Brown, 1st Wash. 298; Triplett *vs.* Washington, 3 Cranch C. C. 646; Iasigi *vs.* Brown, 1st Curtis, 401; Section 724 was held not to be applicable to production before trial, while in Bloede & Co. *vs.* Brancroft, 98 Fed. 175, and Gray *vs.* Schneider, 119 Fed. 474, the contrary rule is laid down. It is respectively submitted that there is nothing in the language of Section 724, or the reasons for the same, which necessitates a construction permitting the compulsory production of the books and papers of the adversary, at any time other than at the trial of the cause. On the contrary, there are valid and cogent reasons for restricting the application of Section 724 to production at trial.

The Pennsylvania statute of 1798, as above referred to, has been invariably restricted by the Courts of Pennsylvania to production at trial (Arrott *vs.* Pratt, 2 Whart. 566; Raub vs. Van Horn, 133 Pa. St. 573; Pa. Co. *vs.* R. R. Co., 9 Pa. County Reports 517; Reed *vs.* Stevenson, 12 Phila. 536; Thomas *vs.* Smith, 1 T. and H. Pr. Section 610), except where the parties have a common interest, *i. e.*, a common property in the document called

for, as the interest of a person selling on commission, in a book containing the entries of his sales (Boyce *vs.* Super, 35 W. N. C. 339), or the interest of a beneficiary in the original policy of insurance, in the possession of the Insurance Company (Pioso *vs.* Equitable Life Company, 12 D. R. 51), which exceptions to the general rule have obviously no application to the case at bar.

The reason for the restriction of the rule is thus stated in Thomas *vs.* Smith (*supra*), and quoted with approval in Raub *vs.* Van Horn (*supra*). "The Act of February 27, 1798, is a highly penal statute, and although in terms it does not confine the rule to produce books and papers to the trial of the cause, yet the uniform practice under the act has so confined it. To extend it further would be accompanied with great danger and inconvenience. The right to inspect books and papers before the trial has therefore been confined to the cases where the parties have a common interest in the instrument of evidence called for. Where books and papers are produced before the court and jury, in a public court, there is an evident restraint upon making an improper use of them. Were we to establish the precedent asked for, every defendant who was willing to pay the plaintiff's demand, would resort to this move for the purpose of fishing up a defense or attack upon the plaintiff, from his books and papers. * * *"

In this connection, the recent decision and opinion of the Supreme Court of Pennsylvania in International Coal Mining Company *vs.* P. R. R., 214 Pa. St. 469, Advance Reports for July 6, 1906, is instructive. In this case a rule of Court permitted depositions to be taken in advance of trial irrespective entirely of the witnesses being aged, infirm or going. A witness having been subpoenaed to appear before a Notary pursuant to a rule to take such depositions declined to answer certain questions. An order having been entered by the Court below directing him to answer, he took an appeal to the Supreme Court of Pennsylvania, who reversed the Lower Court upon the ground of the illegality of the procedure in question, and saying:—

"By the rule in the court below, under which the appellee insists that it has a right to examine the appellant outside of court and in advance of the trial, either party to a pending action may at any time, as a matter of course, with no cause existing for doing so, proceed to examine any witness in advance of the trial, though he be neither aged, infirm nor going, and there be no reason for supposing that he will not appear in court when subpoenaed to do so. The rule is: 'A rule may in like manner be entered by either party to take the depositions of witnesses without regard to the circumstances of their being aged, infirm or going witnesses, stipulating, however, eight days' notice to the adverse party; subject, nevertheless, in all other respects to the existing rules and regulations.'

"In the regular and orderly trial of a cause witnesses appear in open court, and jurors, from seeing, as well as hearing them, pass upon their credibility. Exception to this wise rule of the common law must be based upon some necessity requiring it to be disregarded in the interest of justice. But under the rule in the court below, for no reason and with no necessity for taking the deposition of a witness in advance of a trial, either party to the action, upon a mere whim or caprice, may compel the examination of every one of his witnesses before a magistrate or notary public in advance of the trial, and require the opposite party, with his counsel, to appear as often as such an examination takes place. In this disorderly innovation upon trial before a jury, licensed by the rule below, the rights of witnesses are not to be overlooked. As a rule it is inconvenient for any one to be interrupted in his business or vocation in life by being compelled in obedience to a subpoena, to appear in court to testify on the trial of a cause; but every member of society must expect at times to be subjected to this inconvenience, because the administration of justice and his duty as a citizen require him to submit to it. This, however, is not the case when he is compelled to appear before a commissioner to testify in advance of the trial upon the mere whim or caprice of a plaintiff or defendant, and in the absence of any necessity requiring him to so appear. There having been no reason shown why the appellant

should have been subjected to the inconvenience and annoyance of being called before a notary public to testify as a witness for the plaintiff in advance of the trial, he has a right to complain of the unwarranted calling of him away from his business, especially as he is liable to be called into court by the very party taking his deposition, to testify on the trial of the cause. It is of this that he complains, and his complaint is just."

Furthermore it is respectfully suggested that there being a doubt as to the construction of Section 724, that the practice thereunder should conform to the practice in the courts of this State under the analogous Act of 1798 (See opinion of Dallas, J., in Frescole *vs.* City, 70 Fed., 337).

It is earnestly submitted, that if the Court shall sanction the practice of the compulsory production of books and papers for the examination of the opposing party prior to trial, it will merely encourage blackmailing litigation and motions for such productions, which will be mere fishing expeditions to obtain material to be used in pending or subsequent litigation. Of course, in the case at bar, where the Plaintiff is represented by honorable counsel, no improper use would be made of any information obtained under the order appealed from, but it is not difficult to imagine instances in which the right to examine books and papers prior to trial (if sanctioned by this court) would be used by unscrupulous practitioners, for the purpose of obtaining information to be used as a basis for other suits, and any rule laid down by this Court must apply not only to the honest litigant and responsible counsel but also to the dishonest litigant and unscrupulous counsel.

This method of obtaining evidence from your adversary as a means of furthering your own side of your litigation was unknown to the common law, and even to Courts of equity, except under the strict safeguards surrounding bills of discovery, where the explanation of a party accompanying the production of a document constituted evidence on his behalf. Under the procedure sustained by the learned Court below, either party to an action may at his pleasure

ransack the papers of the opposing party without the supervision and control exercised by the Court when papers are produced at trial. In the case of a certain class of litigations, the plaintiff therein, even if he fails to find anything which is helpful on such examination prior to trial, may discover something which is available for future litigation, or for blackmail, so that he may discontinue his pending litigation and start on a new track. It is even conceivable that a plaintiff of this class might even start litigation, not with any hope of success, but merely to make it a basis for a fishing expedition for ammunition. It is most strongly urged upon the Court that the practice in question serves no public purpose; it not justified by the terms of the Act of Congress, nor the principles of the Common Law or Courts of Equity, but that on the contrary it violates that sound public policy which frowns upon the professional litigant and his champertous attorney, and is a practice which should be condemned as strongly by this Court as the practice condemned by the Supreme Court of Pennsylvania in International Coal Mining Co. *vs.* Railroad Company (*supra*).

4. The car distribution orders of the Defendant, whose production is ordered by the Court below, are not "evidence pertinent to the issue."

It is submitted that such portion of the order of the Court below as requires the defendant company to produce and submit, prior to trial, for the inspection of plaintiff, "All special orders issued at any time between the first day of May, A. D. 1902, and the first day of January, A. D. 1904, and which were in force and effect between said dates, although made prior to said first day of May, 1902, ordering and directing the distribution of coal cars to the said Berwind-White Coal Mining Company, etc.," cannot be sustained, as such special orders are not evidence pertinent to the issue as required by Section 724. It is, of course, obvious, that the mere production of these car distribution orders, would not prove anything with respect

to the actual distribution of cars, and that such car orders would be inadmissible in evidence as irrelevant. Accordingly, as they are not, neither do they contain evidence "pertinent to the issue," their production cannot be ordered.

5. The order entered by the court below is, in substance, a final definitive order or decree against the Plaintiffs in error, from which a writ of error will lie.

The plaintiffs, by a petition addressed to this court, sought and secured an order upon the plaintiffs in error, requiring them to submit to the inspection of the plaintiff and its agents certain books and papers. The order thus obtained was a final one, in the sense that it exhausted the power of the court in the proceeding in which it had been made. Even failure, on the part of the plaintiffs in error, to comply with its directions, would not open the door to further proceedings or orders, for such failure on their part would not subject them to any pains or penalties whatsoever; the penalty of such disobedience would be visited upon the defendant in the main action, for by the provisions of Section 724 of the Revised Statutes, under which the proceeding was had, failure to produce books and papers by a defendant when ordered authorizes "entry of judgment against the defendant by default" and this is the only penalty that follows such failure. In what respect then does the order fall short of being a final one?

> "Whenever in a cause there is a determination of some question of right, a decision is final, in the sense in which an appeal from it is permitted, if it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the court, so that to bring the cause again before the court for decision will not be necessary. Mackeye *vs.* Mallory (decided by this court February 23d, 1897), 24 C. C. A., 420, 79 Fed. 1; Rouse *vs.* Hornsby, 14 C. C. A., 377, 67 Fed. 219; Gumbel *vs.* Pitkin, 113 U. S. 545, 5 Sup. Ct., 616; Central Trust Co.

vs. Grant Locomotive Works, 135 U. S. 207, 10 Sup. Ct. 736."

Wallace, Circuit Judge, in Butler *vs.* Fayerweather, 91 Federal Reporter, page 458.

Tested by the above definition of a final order the order involved in the present proceeding was certainly final, for beyond all controversy it did finally and completely dispose of the case to which the plaintiffs in error were parties, or in which they were concerned, leaving open no question or matter for further consideration or action by the court.

In International Coal Mining Company *vs.* Penna. R. R. Company, 214 Penna., 470, Lloyd, the appellant, having been directed by the lower court to answer a question at a meeting pursuant to a rule for depositions, refused so to do, and appealed to this court. In sustaining the appeal, Mr. Justice Brown, said, "If the appellant had not appealed from the order directing him to answer, the penalty for disobedience of it immediately confronted him. Though not interested in the result of the suit between the plaintiff and defendant, he is very much interested in the order of the court, which is final as to him, and he, therefore, has a right to be heard on the question of the authority of the court to make it, *without waiting to be attached for refusing to obey it.*"

But it will doubtless be argued that the present case is controlled adversely to the plaintiffs in error by the decision of the Supreme Court in the case of Alexander *vs.* United States, 201 U. S. Reports, page 117. The two cases, however, are clearly distinguishable.

In the Alexander case a suit was pending in a Circuit Court of the United States under the Anti-Trust Act, and testimony was being taken before an examiner. The Circuit Court made an order requiring a witness to answer certain questions and to produce certain books before such examiner, and from this order the witness affected by it appealed. The Supreme Court dismissed the appeal holding that the order was not a final one. The court seems to

have rested its decision upon the proposition that an order made upon a witness to answer questions or produce documents, either upon the trial of the cause or before an examiner, was not an order made in any case or controversy between the witness and the party at whose instance it had been entered; but was merely an interlocutory order in the main cause.

Mr. Justice McKenna, who delivered the opinion of the court, adopted as a correct statement of the law upon the subject the following extract from an opinion of Circuit Judge Van Deventer, rendered in a case in which that Judge had been called upon to deal with a somewhat similar question: –

> "I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the government, as a sovereign, vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witness in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

It will be observed that the court holds that when a final order is made against a witness in any proceeding which can be regarded as a suit or controversy, to which he is a party, the right to appeal arises.

That this is a correct statement of the court's view is further shown by the manner in which Mr. Justice McKenna treats the previous decisions of the court in the cases of Interstate Commerce Commission *vs.* Brimson, 154 U. S.,

447, and Interstate Commerce Commission *vs.* Baird, 194 U. S., 25.

In both these cases the question involved related to the power of the court to compel answers and production of documents by witnesses, and in both the Supreme Court had considered and acted upon appeals which had been taken from the orders made, and had consequently dealt with these orders, not as interlocutory in the proceedings in which the testimony was sought, but as final in the separate proceedings against the witnesses. "Those cases," says Mr. Justice McKenna, referring to the Brimson and Baird cases, "rested upon statutory provisions which do not apply to the proceedings at bar, and while there may be a resemblance to the latter there are also differences."

What the learned justice evidently meant by this was, that the orders in the Brimson and Baird cases were made in proceedings against the witnesses which were distinctly substantive proceedings of themselves, and were not merely orders made upon a witness called to testify in the main proceeding, for the court will observe that Mr. Justice McKenna saw no distinction between the case of a witness called to testify upon a trial and that of the witness called to testify before an examiner. "Why," he says, "should greater rights be given a witness to justify his controversy when summoned before an examiner than one summoned before a court? Testimony at times must be taken out of court."

The effect of the decision in the Alexander case, taken in connection with the decisions in the Brimson and Baird cases, may be thus summarized:—

That when an order upon a witness to answer questions or produce documents is made in a proceeding against the witness, which amounts to a case or controversy within the generally accepted meaning of those terms, an appeal from such order will be sustained if the order is a final one; that where, however, the order upon the witness is made when he is upon the stand or before an examiner, such order cannot be appealed from because no case or controversy, to which the witness is a party, has arisen, but an

appeal will lie at the instance of the witness when an order punishing him for refusing to answer or produce the documents has been made, because then an order has been made in a case or controversy to which the witness is a party.

It is confidently submitted that the present is within the first above mentioned class of cases, and that, consequently, the writ of error, which is now before the court, was properly taken.

JOHN G. JOHNSON,
Counsel for the Plaintiffs in Error.

EVENING POST JOB PRINTING OFFICE, NEW YORK

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 284.

IN CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PENNSYLVANIA COAL & COKE COMPANY,
Plaintiff in Certiorari,

AGAINST

ALEXANDER J. CASSATT and Others,
Defendants in Certiorari.

BRIEF FOR PLAINTIFF IN CERTIORARI.

Statement.

The Pennsylvania Coal & Coke Company, plaintiff in certiorari, has pending and at issue in the Circuit Court of the United States for the Eastern Division of Pennsylvania an action at law against the Pennsylvania Railroad Company, defendant in certiorari, to recover damages under Section 8 of the Act to Regulate Commerce for unlawful discriminations practised by the defendant against the plaintiff in the matter of furnishing cars for the

transportation of coal and coke produced at the mines of the plaintiff in the State of Pennsylvania, and in the giving of rebates and otherwise (Record, pp. 4-8).

After issue joined and before trial the plaintiff gave notice to the defendant that an application would be made for an order requiring the defendant, its officers, agents and employees to produce for the inspection of plaintiff before the trial of the action certain books, records and documents in the custody and under the control of the defendant and permitting the plaintiff to prepare tabulated abstracts from said books, records and documents, and directing that the defendant upon failure to comply with an order so obtained should suffer judgment by default (Record, pp. 12-17). The application was based on Section 724 of the Revised Statutes of the United States, which is as follows:

> "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery. If a plaintiff fails to comply with such order, the Court may, on motion, give the like judgment for defendant as in cases of non-suit; and if defendant fails to comply with such order, the Court may, on motion, give judgment against him in default."

The railroad company filed an answer to such application and motion, alleging (1) that the action was brought to recover damages in the nature of penalties and that therefore defendant was not obliged to produce its books and papers for inspection either before the trial or at the trial; (2) that

even if the action was one in which the defendant could be required to produce its books and papers at the trial, it could not be required to do so before the trial; (3) that the defendant was then unable to state whether it could produce all the books and papers referred to in the plaintiff's petition; (4) that if any order be made it should be confined to such papers only as related to or affected the allotment of cars made within the period covered by the action (Record, pp. 18, 19).

On the return of the motion, the Court, after argument, made an order (Record, pp. 19-21) requiring Alexander J. Cassatt, president; John B. Thayer, fourth vice-president, head of the traffic department; Charles E. Pugh, second vice-president, head of the transportation department, and certain other officers and agents of the defendant, to produce and submit to examination of the plaintiff, its agents, accountants and attorneys, the books and papers of the defendant described in the petition, and also that the same be produced before trial at a specified time and place for the inspection of the plaintiff and with leave to the plaintiff to make copies thereof. Alexander J. Cassatt and the other officers and agents of the defendant named in the order sued out, as individuals, a writ of error, the assignments being:

> "1. The Circuit Court erred in entering the order and decree of April 12, 1906, requiring the plaintiffs in error to submit to the inspection of the plaintiff and its counsel prior to the trial of said cause the books, records and papers referred to in said order.
>
> 2. The Circuit Court erred in entering the order and decree of April 12, 1906, requiring the plaintiffs in error to produce at the trial of the cause the books, records and papers referred to in the said order."
>
> (Record, pp. 21, 22.)

Argument was had in the Circuit Court of Appeals for the Third District on this writ of error October 4, 1906, before the Honorable Judges Gray and Buffington, Circuit Court Judges, and the Hon. Judge Lanning, District Judge for the United States District Court of New Jersey, and at the same time a similar question was argued in *Webster Coal & Coke Company* vs. *Pennsylvania Railroad Company,* and *Mitchell Coal & Coke Company* vs. *Pennsylvania Railroad Company.* The Circuit Court of Appeals, in deciding the cases, filed a majority and a minority opinion (Record, pp. 25-41) in the Mitchell Coal & Coke Company's case and made the majority opinion cover and determine the questions presented in the other two. The opinion in the Pennsylvania Coal & Coke Company's case was *per curiam* and as follows:

> "The record of this case is similar to that in Alexander J. Cassett *et al.*, plaintiffs-in-error, *vs.* Mitchell Coal & Coke Company, defendant-in-error, decided at this term. The same questions of law are presented. The opinion in that case controls the decision of this. The motion to dismiss the writ of error is denied and the judgment of the Circuit Court is reversed with costs" (Record, p. 25).

Judgment in accordance therewith was entered on January 7, 1907 (Record, p. 42).

On the petition of the Pennsylvania Coal & Coke Company on April 29, 1907, a writ of certiorari was awarded to bring to the Supreme Court of the United States the said judgment and transcript of the record and proceedings of the Circuit Court of Appeals for the Third Circuit, and on the further petition of said Pennsylvania Coal & Coke Company, verified May 8, 1907, an order was made directing that the cause be advanced on the docket for argument at October Term, 1907.

ARGUMENT.

I.

The Circuit Court of Appeals had no power to review the order of the lower court.

The order granted below was not "a collateral matter distinct from the general subject of litigation affecting only the parties to the particular controversy, and finally settling the controversy," such as was referred to in *Brush Electric Company* vs. *Electric Improvement Company*, 51 Fed., 557. The order had distinct and important bearing on the general subject of the litigation, and affected the plaintiff and defendant in the principal case rather than the parties to the particular controversy. In fact, it did not affect the defendants in certiorari as individuals at all, the order being directed against them in their representative capacities. If the penalty prescribed in Section 724 for disobedience of the order is not exclusive and the Court has power to punish disobedience or enforce compliance, then, under the authority of *Alexander* vs. *United States*, 201 U. S., 117, the order, prior to such action on the part of the court, is interlocutory in the principal suit.

On the other hand, if the penalty be considered exclusive, then the order, so far as concerns the defendants in certiorari, was mere *fulmen brutum* and they were in no way aggrieved. Still further, the order was rendered in a proceeding for the protection of the rights of the party to the suit for whose benefit it was made and for that reason not reviewable.

Doyle vs. *London Guarantee Co.*, 204 U. S., 599.

II.

The order was properly directed against the officers and agents of the defendant.

A corporation can act and its obedience be compelled only by and through the individuals representing it. Section 724 is silent as to the form that the mandate of the court shall take. There is the broad provision that the courts may "require" a party to produce books or writings in its possession or power. How more effectually can the court "require" a corporation to produce books and writings than by an order directed to those through whom it must act?

As was said by this court in *Nelson* vs. *United States*, 201 U. S., 92, 115:

> "It is as useless as attempting to demonstrate that twice two make four, to say that a corporation can have possession of nothing except by the human beings who are its officers, and it is to them, not the intangible being they represent and act for, that the law directs its process of subpœna and must procure its evidence."

In reply to the argument of counsel for defendants in certiorari that the persons named in the order might cease to be officers or agents of the company before the return day of the order and thereby subject the defendant corporation to judgment by default, it is sufficient to say that the penalty of Section 724 does not follow as of course, but can be enforced only in the discretion of the Court, on further motion, where all matters in excuse or extenuation of non-compliance with the order would properly be presented.

The two cases cited by the Court below in support of its position that the order should have

been directed to the defendant *co nomine* instead of to its officers and agents are *Rose* vs. *King*, 5 S. & R., 421, and *Ridgeley* vs. *Richard*, 130 Fed., 387.

In *Rose* vs. *King*, the order was directed to one Huling, who was the agent of individual plaintiffs, and it was not disclosed whether the paper called for was in the possession of Huling as agent or as owner. In *Ridgely* vs. *Richard*, the application was for an order directing the defendant to produce the books and papers of a corporation which was not a party to the action, but of which one of the defendants was an officer.

It is submitted that neither of these cases is in point and that both the nature and effect of an order directing the officers and agents of a corporation to produce its books and papers is that of an order against the corporation itself.

III.

Section 724 authorizes, in an appropriate case, an order for the production of books and papers before trial.

Such has been the almost uniform practice of the Courts.

The cases are reviewed at length in *Blocde* vs. *Joseph Bancroft & Sons Co.*, 98 Fed., 175. Judge Bradford there states that diligent search had failed to disclose any authorities against the proposition except *Iasigi* vs. *Brown*, Fed. Cas. No. 6,993, and *U. S.* vs. *National Lead Co.*, 75 Fed., 94.

Iasigi vs. *Brown* was decided by Mr. Justice Curtis in 1853, the action having been brought in the Circuit Court for the District of Massachusetts. His opinion was quite brief, and there was no citation of any authority. In a subsequent case in

the same district, *Merchants' National Bank* vs. *State National Bank*, Fed. Cas. 9,448, decided in 1868, Mr. Justice Clifford, in commenting on the scope of the section, said:

> "No doubt is entertained that the motion may be made in a pending action at law before the day of trial; but the requirement of the order of the Court must *perhaps* be that the books and writings be produced at the trial of the action. * * * Production before the trial is not *perhaps* contemplated by the words of the provision, nor is it in general necessary."

The italics are ours.

The views of Mr. Justice Clifford and Mr. Justice Curtis on this point were considered by Judge Putnam in *Caspary* vs. *Carter*, 84 Fed., 416, in the said circuit, to be in conflict. Judge Putman said:

> "We are not required under the circumstances to determine whether production can be compelled before trial; but Mr. Justice Curtis and Mr. Justice Clifford apparently differ on this point, as shown by the cases cited."

In the other case, *U. S.* vs. *National Lead Co.*, which was an action brought in the Circuit Court for the District of New Jersey, the question appears to have been only superficially considered. Judge Green there said:

> "But by the very words of the statute the exercise of the power vested in the Federal courts to require production of such books or writings is limited to causing such production to be made at the trial. The words are not broadly 'in any action at law at any time' the Court may require the production of books, but there is an express limitation found in the words 'on the trial of any action.' It is then, at that particular time—

> at the trial, and at no other time—that the Court may, in its discretion, order books to be produced. * * * The words of the statute are so clear that no construction other than this obvious one could be made."

The trouble with this reasoning is that Judge Green was not construing the words of the statute. The statute reads "in the trial of actions at law" and not "on the trial of any action;" and in this connection it is instructive to note the use in the statute of the preposition "in" instead of "at" or "on," which would naturally have been used had it been intended to limit the statute in that regard. Also, no one has questioned that a motion to produce may be made before the day of trial, yet if "in" meant "at," then the motion could only be made "at" the trial, for the section reads "In the trial of actions at law, the courts may, on motion," etc.

Judge Lanning, writing the prevailing opinion in the case below, observes that in the opinion in *Bloede* vs. *Joseph Bancroft & Sons Co.* there is no reference to *Bas* vs. *Steel*, Fed. Cas. No. 1088, or to *Dunham* vs. *Riley*, Fed. Cas. No. 4155. There was no occasion for any such reference, for in both *Bas* vs. *Steel* and *Dunham* vs. *Riley* the application was for the production of books and papers at the trial, and the question as to whether or not the section authorizes the production before trial was not considered in either case. Judge Lanning seems to have reached his conclusion that Section 724 does not confer power to require a party to produce books or papers before trial upon the theory that an order to produce before the trial constitutes in common law no part of the record of the action and cannot be excepted to, and therefore that if judgment should be entered against a party because of his failure so to produce, the judgment would necessarily be reversed on error for want of

a record to support it. This reasoning of the learned judge would be equally applicable in the case of an order to produce at the trial, for in either case, in the event of disobedience of the order, the remedy of the party aggrieved is the same—a further motion for judgment because of non-compliance. It is submitted, also, that whether or not the penalty provided in the section can be enforced in a particular case is not determinative of what is authorized by the section.

The reasoning of the section is all in favor of plaintiff's contention. As was expressed by Judge Bradford in *Blocde* vs. *Joseph Bancroft & Sons Co.:*

> "The statute, however, is remedial and as such entitled to a liberal construction. It provides for the production of books or writings 'in cases and under circumstances' where the parties 'might be compelled to produce the same by the ordinary rules of proceeding in chancery.' * * * It is, and was at and prior to the time of the passage of the judiciary act, within the settled jurisdiction of chancery and a usual practice to order production before trial of an action at law of documents containing pertinent evidence for inspection by a party having the requisite interest therein and desiring to use the same in preparing himself for trial.
>
> It must be assumed that Congress in passing the judiciary act was aware that the 'circumstances' under which production might be compelled in chancery embraced cases where the purpose of the party applying was to inspect, examine and take copies of the books or writings before the trial of an action at law in order to prepare for such trial. It is reasonable, then, to conclude that the statute authorizes the Court in actions at law to order production for inspection, after issue joined, in all cases and under all circumstances where it might have been ordered in chancery in aid of parties to such actions, and that this Court sitting

> as a court of law can in such actions under pain of non-suit or default enforce the production of books or writings to the same extent and for the same purposes as when sitting as a court of equity, and compelling production in aid of such actions. Unless the terms 'in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery' are to be wrested from their natural meaning, it is difficult to perceive that production before trial is not equally with production at the trial within the scope of the provision. There is no sufficient warrant for an assumption that Congress intended that production of books and writings for inspection should be had only at the trial. Such a practice would, in many instances, be inconvenient, dilatory and expensive, with nothing to justify it, leading to postponements to allow time for inspection and calculated to embarrass or defeat the due administration of justice."

Blocde vs. *Joseph Bancroft & Sons Co.* has been followed in *Newgold* vs. *American Novelty & Mfg. Co.*, 108 Fed. Rep., 341; *Grey* vs. *Schneider*, 119 Fed., 474; and *Cameron Lumber Co.* vs. *Droney*, 132 Fed., 304.

IV.

The case is one in which the order might have been granted under the ordinary rules of proceeding in chancery.

1. *The action is not one for a penalty.* Section 8 of the Act to Regulate Commerce, on which this action is based, is as follows:

> "§ 8. LIABILITY OF CARRIER IN DAMAGES. —That in case any common carrier subject

> to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

An action under this section has been termed in *Parsons* vs. *Chicago & Northwestern Railway Co.*, 167 U. S., 447, an action "to enforce what is in its nature a penalty." The distinction, however, between such an action and one to recover a penalty is pointed out in *Huntington* vs. *Attrill*, 146 U. S., 657, and we quote somewhat at length from the opinion in that case:

> "Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
>
> The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be 'penal against the hundred, but certainly remedial as to the sufferer.' *Hyde* vs. *Cogan*, 2 Doug., 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other

person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. *Bones* v. *Booth*, 2 W. Bl., 1226; *Brandon* vs. *Pate*, 2 H. Bl., 308; *Grace* v. *McElroy*, 1 Allen, 563; *Read* v. *Stewart*, 129 Mass., 407, 410; *Cole* v. *Groves*, 134 Mass., 471. As said by Mr. Justice Ashurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, 'It has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action.' *Woodgate* v. *Knatchbull*, 2 T. R., 148, 154; *Read* v. *Chelmsford*, 16 Pick., 128, 132. Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be 'not like a penal law where a punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty, but it is to the party grieved.' *Lake* v. *Smith*, 1 Bos. & Pul. (N. R.), 174, 179, 180, 181; *Wilkinson* v. *Colley*, 5 Burrow, 2694, 2698. So in an action given by statute to a traveller injured through a defect in a highway, for double damages against the town, it was held unnecessary to aver that the facts constituted an offence, or to conclude against the form of the statute, because, as Chief Justice Shaw said: 'The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity.' *Reed* v. *Northfield*, 13 Pick., 94, 100, 101."

Huntington vs. *Astrill* was followed in *Brady* vs. *Daly*, 175 U. S., 148, where the Court, in passing upon Section 4966 of the Revised Statutes: "Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum not less than $100 for the first and $50 for every subsequent performance as to the Court shall appear just," said:

> "The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, 'liable for damages therefor' * * * It has nothing in the nature of a *qui tam* action about it, and we think it provides for the recovery of neither penalty nor forfeiture."

In *City of Atlanta* vs. *Chattanooga Foundry & Pipe Works*, 127 Fed., 23, decided by the Circuit Court of Appeals for the Sixth Circuit and affirmed by this Court in 203 U. S., 390, the action was to recover damages under the seventh section of the act of Congress of July 2, 1890, Chapter 647, the so-called Sherman Act. The first three sections of the act are penal beyond question. They forbid certain contracts and combinations and provide that persons violating the same shall be deemed guilty of a misdemeanor and subject to punishment by both fine and imprisonment. The seventh section of the act, under which action was brought by the City of Atlanta, provides that any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the act, may sue therefor and recover threefold the damages by him

sustained and the costs of the suit, including a reasonable attorney's fee. It was held that the action did not fall within Revised Statutes, §1047, limiting to five years any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States"; and Judge Lurton, in writing the opinion of the Circuit Court of Appeals, said (p. 29):

> "The remedy is not given to the public, for no one may bring the action save the person 'who shall be injured.' etc., and the recovery is for the sole benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action a penal action within the meaning of Section 1047, Revised Statutes."

Finch v. *Rikeman*, 2 Blatch., 301, cited by plaintiffs in certiorari, was an action brought to recover damages for infringement of patents, and Betts, *J.*, there said:

> "The effect of the evidence sought for will be not only to enable plaintiff to recover his entire damages, but its direct consequence will be to subject the defendants to a penalty of three times the amount of those damages under Section 14 of the Act of July 4, 1836 (5 Stat. at Large, 123). I think it against the rules of equity to allow a bill of discovery in such a case unless the bill relinquishes all claim to the penalty which may be superinduced by the production and exhibition of the books, and, for that cause the motion must be denied."

This case must be considered overruled by *City of Atlanta* v. *Chattanooga Foundry and Pipe Works*, but in any event does not support the contention of defendants in certiorari, for in the case at bar recovery is for the sole benefit of the person injured and is limited to the actual damages sustained.

The effect of those other portions of the Act to Regulate Commerce which provide for the recovery of fines at the suit of the Government will be considered hereinafter, but we submit that in itself considered this action is not of such a nature that an application for discovery therein would have been repugnant to the rules of chancery.

2. *Defendants in certiorari will not be heard to say that the discovery might subject them to criminal prosecution or to a penalty or forfeiture.*

By Section 3 of "An Act to Regulate Commerce with Foreign Nations and among the States," enacted February 19, 1903 (32 Stat., 848), it is provided that,

> "in proceedings under this act and the acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation from producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or

> thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceeding."

And in the Act of February 25, 1903 (32 Stat., 904), making appropriation of certain moneys for the enforcement of the provisions of the "Act to Regulate Commerce" and of the "Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," it is provided that

> "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or transaction under said acts."

These provisions afford defendants in certiorari complete immunity from any liability at the suit of the Government under other sections of the Act to Regulate Commerce because of their testimony in this action, and neither the Fifth nor the Fourth amendment to the Constitution applies.

Hale vs. *Henkel*, 201 U. S., 43;
McAlister vs. *Henkel*, 201 U. S., 90.

Neither does the chancery rule that a bill of discovery will not lie in a case which involves a penalty or forfeiture apply, for this so-termed "pardon in advance" brings the case within the well-recognized exceptions:

> "If the prosecution to which the party might be exposed, or his liability to a penalty or forfeiture, is barred by lapse of time; or if the offence has been pardoned; or if the penalty or forfeiture is expressly waived in the bill, and the plaintiff is the person who is entitled to the advantage of the penalty, or of the forfeiture to which the defendant would render himself liable by making the

discovery; or if in any other way the reason of the rule as to exemption from discovery fails, the party interrogated is bound to answer."

Kerr on Discovery, p. 153;
Reg. vs. *Boyes*, 1 B. & S., 311;
Corporation of Trinity House vs. *Burge*, 2 Simons' Ch., 411;
Skinner vs. *Judson*, 8 Conn., 527;
McCreery vs. *Ghormley*, 6 N. Y. App. Div., 170;
Brown vs. *Walker*, 161 U. S., 591, 598.

3. *Defendants in certiorari cannot set up any privilege of the Pennsylvania Railroad Company as against their testimony or the production of the railroad company's books.*

In *The King of the Two Sicilies* vs. *Willcox*, 1 Simons' Ch., N. S., 301, 329, the defendants resisted discovery on the ground that the production of the papers might incriminate the persons for whom they had been acting as agents. The plea was overruled and the Court said:

"The defendants, it will be observed, say that the production of the documents might subject certain persons in Sicily as well as themselves, to highly penal consequences. It is hardly necessary to say that so far as the objection relates to the consequences which the discovery might entail on others, it would not hold even if the penalties would be incurred in this country. The privilege is confined to penal consequences likely to be occasioned to the party himself; *Nemo tenetur seipsum prodere;* but there is no privilege against disclosing matter within the knowledge of the party merely because it might subject other persons to punishment."

In *McAlister* vs. *Henkel, supra*, it is said:

"Indeed, the authorities are numerous to the effect that an officer of a corporation can-

> not set up the privilege of a corporation as against his testimony or the production of their books."

And in *Nelson* vs. *United States,* 201 U. S., 92, 115:

> "Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs."

4. *Conceding that defendants in certiorari are entitled to assert the rights of the defendant corporation with respect to the production of its books and papers, such defendant is not entitled to the privilege.*

(*a*) Congress has expressly provided that a defendant in an action for damages under Section 8 of the Act to Regulate Commerce may be compelled to produce its books and papers.

Section 9 of the Act to Regulate Commerce is as follows:

> "In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

The case at bar thus falls within the exception to the chancery rule noted by *Kerr on Discovery,* p. 154, as follows:

> "The legislature has in some cases expressly provided that parties to transactions

> rendered illegal by statute shall be compelled to answer bills in equity for the discovery of such transactions; in such cases, therefore, the defendant cannot protect himself from the discovery required, on the ground that it will render him liable to the penalties imposed by the statute itself."

In *Enc. of Plead. & Prac.*, Vol. 6, p. 746, the exception is stated thus:

> "The rule that a defendant need not discover matters which would convict him of crime, or have a tendency thereto, is inapplicable when there are statutory enactments specially providing that his answer shall not be used against him in a criminal prosecution."

The application of this doctrine in chancery practice will be found in *Perrine* vs. *Striker*, 7 Paige, 598; *Siffkin* vs. *Manning*, 4 Edw. Ch., 37; *Rose* vs. *Savings Fund*, 6 Phil., 10; *Philadelphia* vs. *Keyser*, 10 Phil., 50.

In *Perrine* vs. *Striker* it was sought to compel a usurer to answer under oath as to his usury under the provisions of Chapter 430 of the Laws of 1837, entitled "*An act to prevent usury.*" By Section 6 of the act, offenders against the statute were declared to be guilty of a misdemeanor and punishable by fine or imprisonment, or both. By Sections 3 and 8 it was provided that such offenders might be compelled to answer on oath any bill exhibited against them in the Court of Chancery for relief, or discovery, or both, but that the testimony so given should "not be used against such person before any grand jury, or on the trial of any indictment against such person." The Chancellor said:

> "The objection that the discovery sought by the bill may subject the defendant to a criminal prosecution is not well taken. The eighth section of the act of May, 1837, to prevent usury expressly provides that the an-

> swer of a defendant in such a case shall not be used against him before any grand jury, or on the trial of any indictment against him. Whether any criminal prosecution can be instituted in any other form against the usurer it is not material to inquire; for the legitimate construction of this section must be, although the word indictment only is used, that his answer shall not be received as evidence on the trial of any criminal prosecution against him."

Siffkin vs. *Manning* was a bill for discovery and relief to get back goods obtained by fraud. The Vice-Chancellor said:

> "I think the statute to compel defendants to answer bills in this court in certain cases where they might otherwise be exempt, Session Laws, 1833, p. 17, applies to this case. Among other things, a defendant shall be compelled to answer 'where the defendant shall be charged with any fraud whatever affecting the right or property of others.' The obtaining goods by false pretences which may subject the party to an indictment is obtaining them by fraud; and though he must answer in relation to the fraud or false pretences, yet the statute forbids any use being made of his answer as evidence against him on any complaint, or on the trial of an indictment for the fraud. This is all the protection that justice requires he should have."

In Rose *vs.* Savings Fund discovery was sought under a statute (Act of March 31, 1860, § 123), which provided:

> "No such trustee, merchant, attorney, broker, agent, director, officer or member as aforesaid shall be enabled or entitled to refuse to make complete discovery, by answer, to any bill in equity or to answer any question or interrogatory in any civil proceeding or in any court of law or equity. But no such answer to any such bill, question or

> interrogatory shall be admissible in evidence against such person charged with any such misdemeanors."

The Court ruled that the defendant should answer, and said:

> "But the 114th section of that act wisely obviates the objection behind which the defendants have taken shelter; that the civil injury for which complainants are seeking to obtain redress here is also an offence under the criminal law; by providing that 'no such answer to any such bill, question or interrogatory shall be admissible in evidence against such person charged with any such misdemeanors.' This brings the rule exactly to the point where it ought to be, and is decisive against the ground taken by the defendants in their demurrer."

A like ruling was made under the same statute in *Philadelphia* vs. *Keyser*.

It is true that the immunity statutes do not apply in favor of a corporation (*Hale* vs. *Henkel*), but if that distinction be important the corporation itself is protected to the extent required in chancery practice under the authorities above cited by the provisions of Section 860 of the Revised Statutes:

> "No pleading of a party nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture."

It will be seen that this exemption runs in favor of a party and therefore includes the defendant corporation. The exemption afforded, that the discovery shall not be given in evidence or in any man-

ner used against the party in any criminal proceeding or for the enforcement of any penalty or forfeiture, is precisely within the immunity provisions considered in Perrine *vs.* Striker, and other cases above considered.

It is not overlooked that this Court in *Counselman* vs. *Hitchcock*, 142 U. S., 547, held that the protection afforded by Section 860 is not co-extensive with the Fifth amendment, but we have already seen that the Fifth amendment does not apply in favor of corporations, so that the reason for applying the strict construction there used fails. As the Court said in the Counselman case:

> "Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

And again:

> "It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him."

Inasmuch as the Fifth amendment does not apply in favor of a corporation, the rule to be observed is the same as if the Fifth amendment had been as thus suggested.

(*b.*) There is no reasonable ground to apprehend danger of a suit by the government based on evidence to which the discovery herein sought might lead.

The books and records called for under the order to produce contain, in all probability, and so far as can now be foreseen, all of the documentary evidence in the possession or under the control of the defendant corporation. The statute of limitations (Revised Statutes, § 1047) will bar any prosecution for a fine long before this case reaches its final adjudication. The danger of a suit by the Government is remote and imaginary and can be invoked, if at all, only to defeat the broad public policy which the Congress has said shall prevail.

In *Regina* vs. *Boyes*, 1 Best & Smith, 311, a witness who was guilty of bribery had been pardoned under the Great Seal, but under the Act of Settlement such pardon could not be pleaded in bar to an impeachment by the House of Commons. In passing on this plea as a bar to discovery, Lord Chief Justice Cockburn said:

> "To entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend danger to the witness from his being compelled to answer. * * * Further than this, we are of opinion that the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, and having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a mere remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford a party, called upon to give evidence in a proceeding *inter alios*, protec-

tion against being brought by means of his own evidence within the penalties of the law. But it would be to turn a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. * * *

It appears to us, therefore, that the witness in this case was not in a rational point of view in the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings; and that it was therefore the duty of the presiding judge to compel him to answer."

Dummer vs. *Corporation of Chippenham*, 14 Vesey, 245, was a case involving a conspiracy to remove the plaintiff from office. Plaintiff's right to a discovery was upheld by Lord Eldon, who said:

"Supposing this bill true, there will be a gross failure of justice if the plaintiff cannot have a discovery of the matters charged. If the principle of convenience and inconvenience pointed out by Lord Talbot, and the notion that by allowing that demurrer there would be a failure of justice, were properly applied in that case, of an officer, why should they not be applied in each case to determine whether the court is authorized to call for an answer? If such a transaction as this can take place and there is no remedy, the consequence is inevitable that every corporation, a trustee for charitable purposes, will have the power of eluding entirely the jurisdiction over charitable subjects. Upon the particular circumstances, therefore, of this case, and without reference to any other case, the assigned cause of demurrer will not do."

And in commenting on the Counselman case, this Court, in *Brown* vs. *Walker,* 161 U. S., 591, 600, gave expression to like views:

> "The danger of extending the principle announced in Counselman *vs.* Hitchcock is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger."

(*c.*) The defendant corporation cannot claim immunity under the Fourth Amendment.

The order below was for the production of certain specified books and papers and takes the place of a *subpœna duces tecum.* There is no element in this of an unreasonable search or seizure. In *Hale* v. *Henkel,* the Court said:

> "We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpœna duces tecum,* the production, upon a trial in court, of documentary evidence. * * * *
>
> "Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of the corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment."

And in the concurring opinion of Mr. Justice Harlan:

> "It seems to me that the witness was not entitled to assert, as a reason for not obeying the order of the court, that the *subpœna duces tecum* was an infringement of the Fourth Amendment, which declares that 'the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not

> be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.' * * * In my opinion, a corporation—'an artificial being, invisible, intangible and existing only in the contemplation of law'—cannot claim the immunity given by the Fourth Amendment; for it is not a part of the "People" within the meaning of that amendment, nor is it embraced by the word "persons" in the amendment."

Mr. Justice Harlan followed up this reasoning in Western Turf Association *vs.* Greenberg, 204 U. S., 359, in a construction of the Fourteenth Amendment, holding that a corporation cannot be deemed a citizen within the meaning of the clause "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Hale vs. *Henkel* was followed on the point under discussion in *In re Consolidated Rendering Company*, decided by the Supreme Court of Vermont in May, 1907 (66 Atl. Rep., 790), where a statute of the State was upheld which provided that a corporation doing business therein should on due notice "produce before any court, grand jury, tribunal or commission acting under the authority of this State all of the books, documents, correspondence, memoranda, papers and data which may contain any account of, reference to, or information concerning, the suit, proceeding, action, charge or subject of inquiry pending before or to be heard or determined by such court, grand jury, tribunal or commission, and which have at any time been made or kept within the State of Vermont and are in the custody or control of such corporation within this State or elsewhere at the time of such notice upon it."

V.

Even if it should be held that the case is not one in which under the ordinary rules of proceeding in chancery discovery might have been compelled, yet the order should be sustained under Section 9 of the act to regulate commerce.

While the plaintiff sought to take advantage of Section 724 in order that on non-compliance the defendant might be subject to judgment by default, yet the order itself (Record, pp. 19-21) makes no reference to Section 724, and this Court can look to the express terms of the statute to uphold the order granted below.

Nothing could be plainer than the provisions of Section 9 upon this point:

> "In any such action brought for the recovery of damages the court before which the same shall be pending * * * may compel the production of the books and papers of such corporation or company party to any such suit."

This plainly authorizes an order for the production of books and papers before trial, for the language "in any such action" is even broader than the language of Section 724 "in the trial of actions at law."

VI.

The judgment of the Circuit Court of Appeals should be reversed.

JOHN W. GRIGGS,
BENJAMIN S. HARMON,
GEORGE S. GRAHAM,
DAVID L. KREBS,
Counsel for Plaintiff in Certiorari.

No.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

Office Supreme Court, U.S.
FILED
APR 20 1908

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, John W. Atterbury, Michael Trump, R. M. Patterson, J. [illegible] Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William [illegible] Thompson, Charles R. Strong, Charles Kingsmore, A. D. Roberts, and R. L. Head, Plaintiffs in Error,

vs.

Webster Coal and Coke Company, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

BENJAMIN S. HARMON,
JOHN W. GRIGGS,
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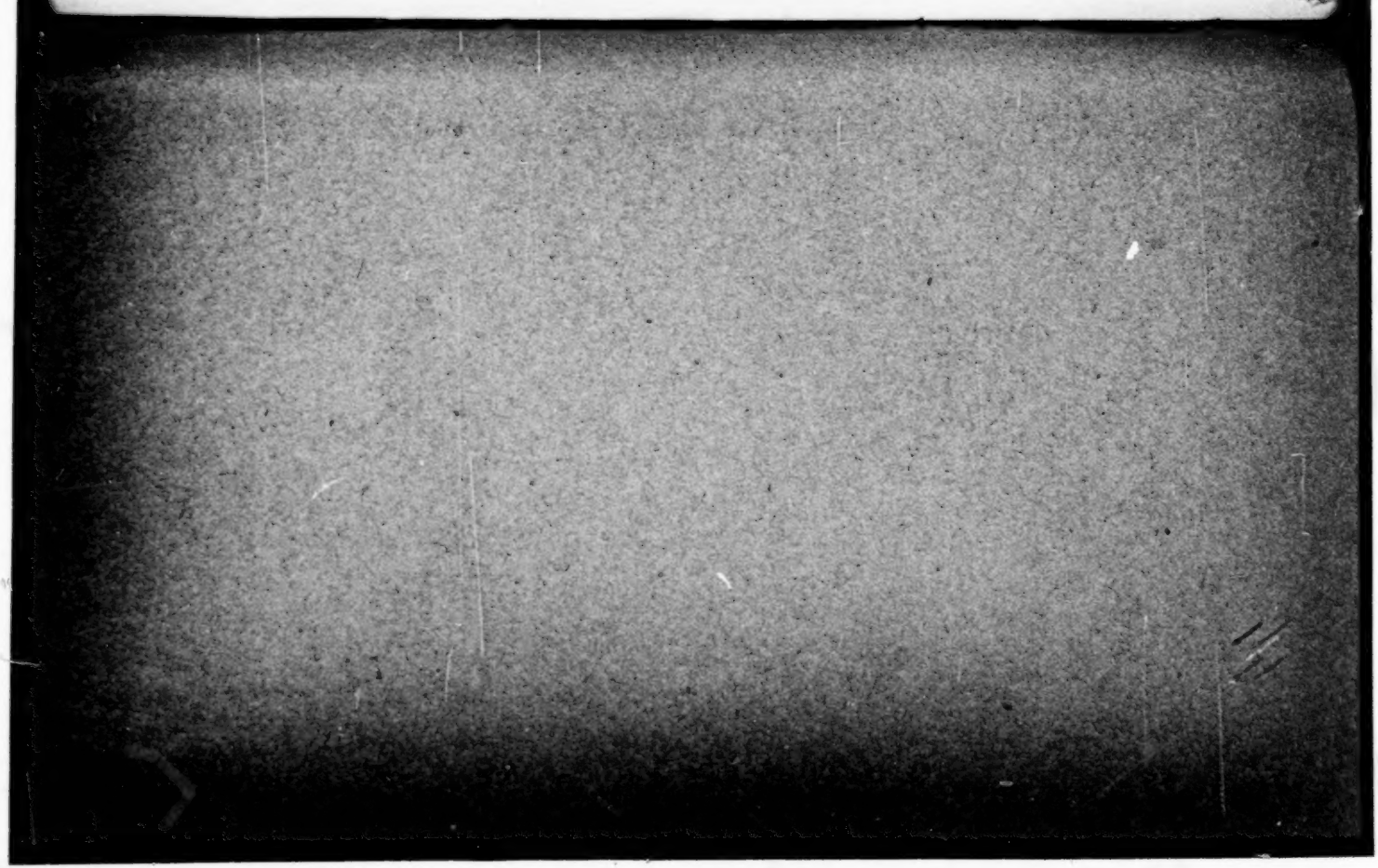

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

October Term, 1906. No.

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Roberts, and R. L. Head, Plaintiffs in Error,

vs.

Webster Coal & Coal Company, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

The plaintiffs in error have divided their argument into three propositions, as follows:

> *First.*—"The order is directed to and against individuals and not to and against a party to the cause, as required by Section 724."

Second.—"The action in which the order complained of was entered is a penal action, and therefore Section 724 is not applicable."

Third.—"Section 724 does not authorize an order for production of books and papers prior to the trial of the cause."

There is added a fourth heading, which bears upon the petition to quash the appeal, filed by the defendant in error, which is as follows:

"The order entered by the court below is, in substance, a final definitive order or decree against the plaintiffs in error, from which a writ of error will lie."

This last proposition is really the only one which it is necessary to discuss at this time and in the present state of the record, because the order from which the appeal in this case was made is an interlocutory decree, and absolutely stamped as such by the decisions of the United States Supreme Court.

In taking up the argument of this case it might be well to answer briefly the propositions made by the plaintiffs in error which go to the merits of the controversy but which are really not presented by the present appeal.

THE FIRST PROPOSITION IS: that "The order is directed to and against individuals and not to and against a party to the cause, as required by Section 724." (Page 4, Brief of Plaintiffs in Error.)

There is really nothing in the argument which the plaintiffs in error have made in support of this proposition, which requires any reply. A number of cases have been quoted in which orders were attempted to be made upon *agents of individuals,* and cases where an order was attempted to be made on a corporation where the officer and not the corporation was the defendant or party to the litigation. It was not necessary to quote cases showing that in such matters no order would be made. The case at bar is an en-

tirely different proposition. Here is a corporation which acts through its officers, and the decree that is made in this case commands Alexander J. Cassatt *as President* of the Pennsylvania Railroad Company to produce books, papers, &c., of the Pennsylvania Railroad Company. The books of the Railroad Company are in the custody, possession and control of its officers and employees, and only by directing the officers and employees to produce the books, papers, &c., could the order be made absolutely effective. Besides this, this conforms to the letter and spirit of Section 724, which makes the proceeding under said section analogous to the Chancery proceedings. It matters not that the plaintiffs in error may attempt to prove that the reason for the Chancery procedure would be different from the reasons for procedure in this case—the result in the Chancery procedure would be that the officers of a corporation would be made parties defendant whenever the corporation was a defendant, and could be subjected to the orders of the court. The section says you shall follow the procedure in Chancery. Therefore, it is immaterial what the reason for the practice in Chancery was. The practice itself is that the officers are made parties defendant in such cases.

THE SECOND PROPOSITION is: 'The action in which the order complained of was entered is a penal action, and therefore the remedy prescribed by Section 724 is not applicable." (Page 7 Brief of Plaintiffs in Error.)

A great many cases of more or less application to this proposition have been inserted in the brief of the plaintiffs in error. The most important case quoted by them is the case of Parsons *vs.* Railway Co., 167 U. S., 447. This is undoubtedly conceived by the plaintiffs in error to be the most important case, because they devote nearly three pages to their brief to the opinion of Mr. Justice Brewer, and we concede that it is the most important case for the plaintiffs in error, because if they cannot secure any comfort from Parsons' case their second proposition must fail entirely.

Now, what did the case of Parsons *vs.* the Railway decide?

In the first place, that case did not undertake to deal with a construction of Section 724, U. S. Revised Statutes, but was dealing with the question as to whether the plaintiff had properly set out a cause of action and had sufficiently proved the same.

In the second place, Justice Brewer did not decide that the right of action springing from the Interstate Commerce law was a penalty, but he says in the Parsons case "That this claim (referring to the claim in the Parsons case) is in the nature of a penalty," and, of course, necessarily, in the discussion of the question he stated what was the law as to proofs governing cases involving the enforcement of a penalty. There is no complaint against his law as relating to penalties. Our criticism rather is that the question that is presented in the case at bar was not presented or passed upon in the Parsons case. The point involved in the case at bar is whether the production of the books &c., can be refused because the main action involved a penalty, and it might be well here to advert to the fact that under the rules of the Court of Chancery, discovery was only refused in cases where there was no doubt of the action being for a penalty or forfeiture, and this immunity given by the Court of Chancery was based upon the proposition that a man could not be compelled to incriminate himself. But a reference to the cases decided by the Court of Chancery will show that when a superior public policy was involved, then the immunity from giving discovery in cases of penalties and forfeitures was overcome. Thus, in the case of Dummer *vs.* Corporation of Chippenham, 14 Vesey, 245 (Lord Eldon), it was stated that discovery always could be compelled in chancery in cases of conspiracy, and by the said Judge, in McCauley *vs.* Shackell, 1st Bligh, New Series, 96, it was held that discovery was always compelled in cases of fraud. This was based upon the principle that in the above mentioned class of cases, where the acts are done secretly, you must not close the avenue of investigation, or else the substantive prohibition against fraud, &c., would be a dead

letter. The same reason is given in the case of Hale *vs.* Henkel, U. S. Supreme Court, Oct. Term, 1905, No. 340 opinion delivered March 12th, 1906. Justice Brown, in his opinion used the following language:

> "Of what use would it be for the Legislature to declare these combinations unlawful, if the judicial power may close the door of access to every available source of information upon the subject?"

The case of Hale *vs.* Henkel was a prosecution under the Sherman Act. It is upon this principle of a public policy superior to the public policy which gave immunity from discovery in chancery, that the production of books is asked in this case. The Interstate Commerce Act was born in public policy and is nurtured in public policy, and, as Justice Brown said with reference to the Sherman Act, its provisions should not be frittered away or nullified by the judicial powers closing the avenues of proof. In other words, Lord Eldon, when confronted by the principle of public policy which gave immunity from discovery, decided that the public policy which favored the discovery and prevention of fraud was greater than the immunity, and that the doctrine of a public policy behind the immunity gave way before the necessity for detecting and hindering conspiracy and fraud.

In the same way the United States Supreme Court, in the case of Hale *vs.* Henkel (Paper Trust case above quoted) made the principle of immunity from discovery subservient to the requirements and necessities of enforcing the Sherman Act. Now, we ask that the court make the principle of immunity from discovery subservient to the necessity and requirement of enforcing the Interstate Commerce Act, which declares the ruling public policy. It might be added that Justice Brewer, whose *dicta* in the Parsons case, and it is respectfully submitted that it is merely *dicta*, dissented in the Paper Trust cases above referred to; and his dissenting opinion in the Paper Trust cases shows the trend of his mind on this subject, which no doubt gave rise to the *dicta* in the Parsons case. Who

can doubt, that if at the present day in a Court of Chancery the proposition was presented that discovery was needed to enforce a provision of the Interstate Commerce Act the court would order and enforce discovery in this connection as tending to establish clearly what the public policy of to-day is upon this subject, it is well to remember that both the Interstate Commerce Act and the Sherman Act provide immunity to witnesses called to testify in connection with cases arising under either. The entire purpose of the lawmakers was to afford the widest possible avenue in the investigation of all matters necessary to enforce the doctrine of public policy announced in these statutes.

Discrimination and inequity had grown to be enormous evils threatening public welfare and destroying the rights of individuals to such an extent that it became absolutely necessary to attempt to destroy these evils by rigid laws forbidding all the underlying practices which produced them. The matter covered by the two laws above adverted to, present the foremost and most important questions of the day.

Over and above all this, in the case at bar the statement filed shows that the claim is for *actual damage*, and not for penalty or anything in the nature of a penalty that is provided for in the Interstate Commerce Act, so that apart from all the discussion as to the law relating to penalty, no penalty is asked in the case at bar. What is asked is a compensation for actual damage sustained.

Thus, in Moelling *vs.* Lehigh Coal and Navigation Company, 9 Phila., page 223, the present Chief Justice of the Supreme Court of Pennsylvania (then Judge) Mitchell, decided that defendants might be compelled to disclose violations of the copyright and patent laws, provided the bills waived the forfeiture and penalties incurred and sought only damages, on the principle that where the claim is for compensation for actual injury sustained, there is no penalty or forfeiture involved, and therefore discovery should be had.

The case of Finch *vs.* Rikeman (page 8, Brief of Plain-

tiffs in error) is quoted by Justice Mitchell in the above case as confirming the doctrine which he therein announces; and yet the plaintiffs in error quote it for the very reverse purposes. In that case, it was said the defendants might be compelled to disclose violations of the copyright and patent laws, provided the bills waived the forfeitures and penalties incurred, and sought only damages. The long quotation at page 7 in the brief of the plaintiffs in error is therefore wholly inapplicable to the question now before the court, but the case is one which supports the order of the court below. The case of U. S. *vs.* National Lead Co., quoted at page 10 in the brief of the plaintiffs in error is not an analogous case and the *dicta* of the court is wholly inapplicable to the present contention. From the nature of that case it is easy to see that the production of the documents, would tend to show the commission of a crime by the defendants, and that therefore on that ground no order would be made. In part of the quotation it is said, compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers to convict him of crime, or to forfeit his property is contrary to the principles of free government. Now this doctrine is one to which the defendant in error will most cordially subscribe, as an accurate statement of the law with reference to crime and forfeiture. But there is nothing in the case at bar savoring of crime and forfeiture. The plaintiff in error contends that the right of action created by sections two and three of the Interstate Commerce Act (pages 12 and 13 of the brief of the plaintiffs in error) is a right of action unknown at common law and is the creation of a penal statute and therefore the plaintiff is not entitled to the remedy conferred by Section 724. Without discussing the question that a common carrier under the common law was only bound to make reasonable charges and was not liable to carry out equal rates and terms for all customers, and notwithstanding the declaration in some of the cases quoted in brief of plaintiffs in error that no remedy existed in common law to correct

the evil of unequal rates or discrimination, it is contended that a very strong argument can be advanced supporting the view that the plastic principles of the common law were sufficiently broad and comprehensive to cover these evils as well as that of charging unreasonable remuneration. The absence of precedent is undoubtedly due to the fact that during the period referred to, these evils of to-day were practically unknown. The movement toward combination and monopoly which is a growth of the last decade or two in the history of the civilized world, had not yet developed these evils hence the absence in the common law of precedents touching them. But assuming that the law was as claimed by the plaintiffs in error, it requires but little reflection to discover that the statutes in question when abrogating the privilege of the common carrier to make unequal rates and discrimination between customers were not dealing with penalty but simply dealing with a civil right. If a man could under the common law sue for damages because of unreasonable charges and not be attempting to collect a penalty equally so a man who now brings suit under the Interstate Commerce Act to recover compensatory damages cannot be accused of attempting to collect a penalty. There was a time in the history of the law when an action for damages resulting from personal injuries, died with the death of the party injured, but the law provided in its wisdom that the action should survive to certain legal representatives. Did this statute inflict a penalty upon any one? Did it not simply provide a remedy for an injury which theretofore could not be asserted in the courts? Is not the result of the Interstate Commerce Act merely to provide a remedy for an injury that was clearly real and existent but remediless before its passage? The argument seems to be fallacious therefore that this action is the creation of a penal statute. It certainly is the result of a regulating statute which defines the duties of common carrier and as our claim is that the Interstate Commerce Act is merely declaratory of the common law, although this claim is not essential to the validity of our argument which is, that whether the injury

is one that existed under the common law and was simply without remedy, or whether the injury as well as the remedy was created by the statute, it does not follow that because of this creation of modern legislation that the action is necessarily penal. It certainly cannot be contended that there is anything involved in the case at bar which shows that the plaintiffs in error are asked to produce books and papers to convict them or any of them of crime or subject them to forfeiture of their property. The doctrine of immunity upon which reliance is placed for a denial of discovery in this case finds its active expression in the fifth amendment to the Constitution of the U. S. It has been judiciously determined in Hale *vs.* Hinkle, decided March 12th, 1906, by the Supreme Court of the United States that the fifth amendment is purely a personal privilege of the witness, and that this cloak of protection cannot be claimed by a corporation. and further an individual cannot plead the fact that some third person or corporation might be incriminated; so that the immunity in question is clearly restricted to the personal privileges of the witness. This doctrine of immunity therefore cannot be claimed for the defense of the Pennsylsylvania Railroad corporation, indeed the Pennsylvania Railroad Company is not a party to this appeal. It has no immunity under the Constitution or the policy of the common law. The record in this case will be searched in vain to find a single word or sentence that presents a personal claim *on* the part of any one of the plaintiffs in error that the production of the books and papers in question would incriminate them or work a forfeiture of their property.

Section 10 of the Interstate Commerce law is invoked in aid of the argument that the suit in this case is to enforce a penalty. The only penalties denounced are those contained in Section 10. Section 10 clearly applies to controversies or prosecutions between the Government, whose law has been violated, and the culprit who has offended against the law. If this were a case brought under Section 10, then the argument of the plaintiffs in

error would have some weight and be entitled to some consideration. But the claim in this case is made under the authority given in Section 8 of the Interstate Commerce Act and this is purely a civil right for compensatory damages.

THE THIRD PROPOSITION is: "Section 724 does not authorize an order for production of books and papers prior to the trial of the cause." (Page 20, Brief of Plaintiffs in Error.)

Several cases are quoted in the brief of the plaintiffs in error in support of this proposition, and the plaintiffs in error suggest that different circuits have decided differently on this question of "production before trial." It seems to us there can be no question about the later decisions in all the circuits and the uniform practice following such decisions, which is that the production of books and papers will be ordered before the trial of the cause, and it will save time to refer to one special case on this subject, which gives the reason for the rule, and that is the case of Bloede *vs.* Bancroft, 98 Federal Reporter, 175 (1899). This is probably the best considered case in the books. The opinion is by Judge Bradford, and after an elaborate review of all the cases he decided that the defendant is required to produce the books and papers prior to the date set for trial. How far in advance of trial, of course, depends upon the circumstances of each case. Any other rule of practice would practically annul the statute and deprive suitors of the remedy which the law clearly intended to provide.

THE FOURTH PROPOSITION is: "The order entered by the court below is, in substance, a final definitive order or decree against the plaintiffs in error, from which a writ of error will lie." (Page 25, of Brief of Plaintiffs in Error.)

This is the real proposition in the case, and it is directly raised upon the petition of the defendant in error asking the court to quash this appeal. The allegation of the defendant in error is that the order appealed from is

an *interlocutory order*, from which no appeal will lie. A copy of the motion to quash and reasons in support thereof is appended to this paper book.

There can be two views taken of this transaction, the first being that the court is confined in the penalty for disobedience of the order to the punishment recited in the section, to wit: "If a defendant fails to comply with such order the court may, on motion, give judgment against him in default." The second is that in addition to that the court may punish the party refusing to obey the order by adjudging him guilty of contempt, and fine or imprison him, as the case may be.

If the first proposition is taken as the true statement of the law, then in the case of Webster Coal and Coke Company *vs.* the Pennsylvania Railroad Company, there must have been a judgment entered in default against the Pennsylvania Railroad Company for its failure to obey the order, and until that is done there is no final judgment, and it might be well to state here that the provision of Section 724 is ancillary to and in connection with the main case and is an order that grows out of the main case. It is not like a bill of discovery, which is a separate proceeding, and from which decree a person may appeal before the main case is settled. Indeed the object of Section 724 was to work out the result by a short and quick method in lieu of the long and cumbersome bill of discovery process, and any order made under Section 724 must await the determination of the main case before an appeal can be had, and when the main case is appealed, then all of the interlocutory orders or decrees can be reviewed together in the Appellate Court. Indeed, you could go further and hold that even if the party who refused to produce was punished for contempt there could be no separate appeal from that judgment, because the punishment for contempt would be ancillary to the main case in a civil action. It is needless for us to state to this court that there is a difference between a punishment for contempt in a criminal case, which undoubtedly gives right to the separate appeal when the punishment

has been inflicted, and the case where the punishment for contempt is upon an order which grows out of and is ancillary to a civil case. But without discussing the question any further as to the difference between a punishment for contempt in a criminal case and in a civil case, the fact remains that there was no attempt to punish for any contempt in this case, and the plaintiffs in error really made no reply of any kind or character to the order appealed from, so that the time for appeal or writ of error has not yet arisen and will not arise until final judgment in the case, and the final judgment, whether on default for failure to produce the books, or after hearing upon the merits of the case, is a final judgment in the main case itself, and the judgment entered by reason of the default is just as much a conclusion of the main case as if the judgment had been rendered after hearing.

If, on the other hand, you take the second proposition above stated, that in addition to the penalty that can be inflicted by the judgment in default, the court can also punish the party who disobeys the order to produce, then under the case of Alexander *vs.* the U. S., 201 U. S. Reports, page 117, the time for an appeal has not yet arisen, because the court must proceed to punish for contempt before the plaintiffs in error would have any right to an appeal, and when the time for that appeal does arrive it cannot be based upon any failure of the parties to the main suit to do or not to do any particular thing, but would be a case between the majesty of the law on the one hand and the recalcitrant person who disobeys its orders on the other hand. It would, perhaps, be well to quote that portion of the opinion in the Alexander case which deals with this question. It is as follows:—

> "As we have said, the court entered orders requiring the appellants to answer the questions put to them and to produce the books, papers and documents requested. Appeals were allowed to this court. To justify the appeals, appellants contend that the orders of the circuit court constitute practically in-

dependent proceedings and amount to final judgments. To sustain the contention, Interstate Commerce Commission *vs.* Brimson (154 U. S. 477), and Interstate Commerce Commission *vs.* Baird (194 U. S. 25) are cited.

Those cases rested on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences. In a certain sense finality can be asserted to the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go farther and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case. Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court? Testimony, at times, must be taken out of court. In instances like those in the case at bar the officer who takes the testimony, having no power to issue process, is given the aid of the clerk of a court of the United States; having no power to enforce obedience to the process or to command testimony, he is given the aid of the judge of the court whose clerk issued the process, and if there be disobedience of the process, or refusal to testify or to produce documents, such judge may 'proceed to enforce obedience * * * or punish disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court.' (Sections 868, 869, Revised Statutes.) This power to punish being exercised the matter becomes personal to the witness and a judgment as to him.

Prior to that the proceedings are interlocutory in the original suit. This is clearly pointed out by Circuit Court Judge Van Deventer, disallowing an appeal from an order like those under review, in the case of Nelson *vs.* United States (No. 490), in error to the Circuit Court of the United States for the District of Minnesota. The learned judge said:—

"'I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possesion is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercise its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the Government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witness in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision.'

"See also Logan *vs.* Penn. R. R. Co. (132 Pa. St. 403, 410).

"This court having no jurisdiction, the appeals must be dismissed, and it is so ordered."

It might be added that the Circuit Court in this Circuit has proceeded in the case of London Guarantee and Accident Co. *vs.* Doyle & Doak, Circuit Court of the U. S., Eastern District of Pennsylvania, April Term, 1904, to punish a man for contempt who failed to obey the order to produce, and that that case was appealed to your Honorable Court and the question of the right of the Circuit Court to so punish for contempt was certified to the

United States Supreme Court, and the argument on that case in the U. S. Supreme Court is likely to be held next month, to wit, November, of 1906.

In Logan *vs.* the Pennsylvania Railroad, 132 Pa., 403, it was settled by the Supreme Court of the State of Pennsylvania, that an appeal from an order to produce books, under the Act of 1798 of the State of Pennsylvania (which Act is almost identical in language with Section 724 Revised Statutes) would not lie, and the appeal taken in that case was quashed on the ground that the order was interlocutory.

The effort of the counsel representing the plaintiffs in error in the case at bar, to prove that the entry of judgment in case of default is in the nature of an execution, certainly cannot command the approval of the court. The learned counsel for the plaintiffs in error contends that when the order is made that thereby a final and definite decree has been entered, from which an appeal can be taken, and that when judgment is entered, in default it is really a sort or species of execution. It surely requires no argument to show the fallacy of this contention, because when the order is entered for production, if there is a failure to obey it, then the other side goes into court and asks judgment in default, and the statute says the court *may* enter judgment. There is nothing in the Act which says that the court *must* enter judgment in default, nor is there anything to show that all the questions as to the pertinency of the evidence and the propriety and scope of the order would not be fully considered by the court before judgment is actually entered, and when judgment is entered then it is the same as if the case had been heard on the merits and judgment entered, and in either case an appeal can be had, and when the case is brought up for review in your Honorable Court then you will review all that has been done in the case in the lower court. No rights are lost to the person against whom judgment has been entered in default, because nothing can happen to aggrieve him until the lower court does enter the judgment.

So much for the proposition of the plaintiffs in error that the order to produce is a definite and final order from which an appeal or writ of error will lie.

TO RECAPITULATE BRIEFLY:—

First.—The order was made against the plaintiffs in error as officers and agents of the Pennsylvania Railroad, the defendant in the original suit, and not against them as individuals. The court called for none of the books or papers of the plaintiffs in error as individuals, but it did call for the books and papers of the Pennsylvania Railroad, the defendant in the original suit. The plaintiffs in error, by appealing as individuals and not as officers of the Pennsylvania Railroad, cannot change the character of the order which the court made against them. It might be said that the order ought to have been against the Pennsylvania Railroad and the plaintiffs in error as its officers, but if this criticism could be made, the time to make it is when the lower court attempts to enforce judgment in default, and the lower court might take the view that the order should be against the Pennsylvania Railroad as well as against the plaintiffs in error as its officers. We would be prepared to hold and argue that the order is substantially and in reality against the Pennsylvania Railroad through its officers and agents. But if the lower court held otherwise then it would not enter judgment by default, and neither the Pennsylvania Railroad nor its officers nor agents would be aggrieved, or at least so aggrieved from which any appeal could be taken, because no final judgment would be entered.

Second.—We believe that the right of action given by Section 8 is not penal in its character, notwithstanding the *dicta* that has been quoted from various cases, and that when the question is flatly presented to the higher courts they will hold that the action, so far as the Eighth Section of the Interstate Commerce Act is concerned, is a civil right to compensatory damages, and not a penalty; and, it might be well to quote the Eighth Section in this connection:—

"That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in his act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

But over and above all this, this question cannot be examined and decided in the present state of the record, because the plaintiffs in error or the Pennsylvania Railroad, whoever is contending that the action is a penal action, must first get a final decision in the main or original case.

Third.—It is confidently asserted by the defendant in error that the later cases which decide that the production of books and papers may be ordered before the trial of the cause, give a correct interpretation of Section 724 Revised Statutes. The language of the section is "In the trial of actions at law," &c., and the counsel for the plaintiffs in error contend that that means in the *actual* trial, but certainly this cannot be seriously considered to be a true construction of the said section. It means actions at law as distinguished from actions in equity, that Section 724 shall apply to, and when you read the decisions, no matter whether they decide that the papers and books should be produced before trial or only at the trial, they all agree that Section 724 was meant for a short cut for a bill of discovery and should be a side order in the main case. If the contention of the counsel for the plaintiffs in error is correct, there would have been no necessity for Section 724, because a subpœna *duces tecum* would have given the

litigant all the rights which this Section 724 gives him, if the said section means that the production of the books and papers cannot be compelled prior to the trial of the cause. The parties are very well protected by the discretion that is lodged in the lower court in making the order, and the evils would be greater by absolutely cutting actions at law," &c., and the counsel for the plaintiffs in a party off from an examination of the books and papers before trial, than to hold that the court had power to order the production of the books and papers before the trial had actually begun. We think the question of misuse of any evidence, and the scope of the order for examination, can be safely left to the wise direction of the judges of the Circuit Court.

Suppose the contention of the counsel for the plaintiffs in error would prevail, that the lower court could not order the production of the books and papers prior to the actual beginning of the trial of the cause in court, to wit, the taking of testimony after the jury had been sworn. How could a suitor who is prosecuting a carrier corporation defendant for secret rebates, secure any evidence or prepare for trial until he could examine the books and papers prior to the date set for trial? Such evidence is locked in the breast of the party offending, and it requires a section like 724 to open the channel, so that the plaintiff, the injured suitor, can secure his rights, and undoubtedly it was to cover this and kindred cases, that Section 724 was passed.

Fourth.—The order appealed from is not a definite or final order from which an appeal or writ of error will lie. The plain proposition of the defendant in error is as follows: There must be a final judment, either in default for failure to produce books and papers, or a judgment after hearing upon the merits of the case, before an appeal will lie. The plaintiffs in error had the order made upon them as officers and agents of the Pennsylvania Railroad Company, and if they failed to obey the order as such officers, judgment would be entered in default against the Penn-

sylvania Railroad Company, unless there is some defect in the order itself, in which case, of course, the Circuit Court would not enter judgment until that defect was remedied, as, for instance, if it was necessary that the Pennsylvania Railroad Company as well as the officers and agents should be named in the order to produce the books and papers.

The only other way that an appeal or writ of error could be taken by the plaintiffs in error would be if there was a separate case or controversy as to them. This could only arise in case the court had power to and had actually visited its punishment for disobedience to the other. If the court had not power to punish for disobedience of the order, on the ground that the only penalty is the penalty contained in Section 724, then the court would be confined to the entry of judgment in default against the Pennsylvania Railroad Company, and nothing could be done with the plaintiffs in error if they refused to obey the decree or order to produce the books and papers. If the court had power to punish for contempt, then the plaintiffs in error must await the next step in the proceeding, to wit, the visiting of the punishment upon them for their disobedience to the order to produce.

It is plain to be seen that the right to a writ of error or appeal has not arrived, because there has been no such final jugdment, either as against the Pennsylvania Railroad Company or as against the plaintiffs in error, as to warrant an appeal or writ of error to this court.

Respectfully submitted,

BENJAMIN S. HARMON,
JOHN W. GRIGGS,
DAVID L. KREBS,
GEORGE S. GRAHAM,
Counsel for Defendant in Error.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES CIRCUIT.

No. . October Term, 1906.

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. S. Robertson, R. L. Head, Plaintiffs in Error,

vs.

Webster Coal and Coke Company, Defendant in Error.

MOTION TO QUASH WRIT OF ERROR.

The Webster Coal and Coke Company, Defendant in Error, by its counsel, respectfully moves the court to quash the appeal in the above stated cause for the following reasons:—

First.—Because the order entered on the 12th of April, 1906, on the defendant, its officers, agents and employees, to produce the distribution sheets and papers therein mentioned, is an interlocutory order and not the subject of an appeal.

Second.—Because the appeal is irregular, not warranted in law and premature.

Third.—Because no error was committed by the Circuit Court in awarding the order on Plaintiff's petition.

Fourth.—Because the order entered applied to and affected the plaintiffs in error as officers and employees of the Pennsylvania Railroad Company, defendant, and not in their personal or individual capacity.

BENJAMIN S. HARMON,
HON. JOHN W. GRIGGS,
DAVID L. KREBS,
GEORGE S. GRAHAM,
Attorneys for Defendant in Error.

Nos. 283.& 284.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

Office Supreme Court,
FILED
APR 20 1907
JAMES H. McKEN

ALEXANDER J. CASSATT, JOHN B. THAYER, CHARLES E. PUGH, et al.
vs.
PENNSYLVANIA COAL and COKE CO.

October Term, 1906
No. 6

ALEXANDER J. CASSATT, JOHN B. THAYER, CHARLES E. PUGH, et al.
vs.
WEBSTER COAL and COKE CO.

October Term, 1906
No. 8

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania

Brief of Defendants in Error

DAVID L. KREBS
Of Counsel for Defendants in Error

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IN THE

United States Circuit Court of Appeals

FOR THE THIRD DISTRICT

October Term, 1906. No. 6

ALEXANDER J. CASSATT, JOHN B. THAYER, CHARLES E. PUGH, W. W. ATTERBURY, MICHAEL TRUMP, R. M. PATTERSON, J. G. SEARLES, GEORGE W. CREIGHTON, WILLIAM W. STRONG, OSCAR A. KNIPE, WILLIAM J. BINGHAM, A. E. FITLER, WILLIAM A. THOMPSON, CHARLES R. STRONG, CHARLES KINGSMORE, A. D. ROBERTS AND R. L. HEAD

Plaintiffs in Error

vs.

PENNSYLVANIA COAL AND COKE COMPANY

Defendant in Error

October Term, 1906. No. 8

ALEXANDER J. CASSATT, JOHN B. THAYER, CHARLES E. PUGH, W. W. ATTERBURY, MICHAEL TRUMP, R. M. PATTERSON, J. G. SEARLES, GEORGE W. CREIGHTON, WILLIAM W. STRONG, OSCAR A. KNIPE, WILLIAM J. BINGHAM, A. E. FITLER, WILLIAM A. THOMPSON, CHARLES R. STRONG, CHARLES KINGSMORE, A. D. ROBERTS AND R. L. HEAD

Plaintiffs in Error

vs.

WEBSTER COAL AND COKE COMPANY

Defendant in Error

BRIEF OF DEFENDANTS IN ERROR

I.

STATEMENT OF THE CASE

In explanation of and supplementing the statement of the case, as printed in the Paper Book of the Plaintiffs in Error, we desire to call attention to the specific language of the order to produce, under date of April 12th, 1906; to point out that the order to produce was not made against the persons named therein as individuals, in their individual capacity or as affecting an individual right, but as the representatives of the railroad company and heads of the specific departments of the company controlling the management thereof in the transportation of the coal freight traffic from the regions in which the alleged records were made, the production of which is called for.

We also call attention to the further fact, that the record fails to disclose any act on the part of the Court or of the Defendants in Error by further proceedings, either in the nature of a Writ of Attachment for contempt of the order of the Court or by any other process, to enforce the order made prior to the time at which the individuals named in the order, as agents and representatives of the railroad company, filed the Writ of Error in the Court below.

II.

The defendants in error, at the very outset of this question, deny the jurisdiction of the Court to review the order at this stage of the proceedings, and we contend that the Writs of Error should be dismissed because prematurely issued.

In support of this contention we cite Section 699 of the Revised Statutes, which is in these words:

Section 699. A writ of error may be allowed to review any final judgment at law and an appeal shall be allowed from any final decree in equity hereafter mentioned without regard to the sum or value in dispute.

Also *Section 6, 26 Statute L. 828. That the Circuit Court of Appeals established by this Act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the district court and the existing circuit courts in all other cases other than those provided for in the preceding section of this Act, unless otherwise provided by law, and the judgment and decrees of the Circuit Court of Appeals shall be final, &c.*

The above sections quoted from the Revised Statutes and the Act of Congress of the 3d of March, 1891, organizing the Circuit Court of Appeals, furnish the only statutory authority for an appeal from the District and Circuit Courts, to the Circuit Court of Appeals.

If the writs of error in the cases now under discussion do not fall within the provisions of these statutes, they must be dismissed.

It will be observed that writs of error in the law courts may be allowed to review *any final judgment.* The important inquiry arising in the very forefront of this inquiry is one of jurisdiction. If the order appealed from is not final, but an interlocutory order, then the writ of error must be quashed.

What then is the rule recognized by the courts in reviewing this subject. We state it as follows:

"A judgment or decree in the common law courts to be final within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on writs of error is one which disposes of the whole case on its merits."

In support of this statement of the rule, we quote as follows, viz:

The rule is well settled and of long standing that a judgment or decree to be final within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the Court below would have nothing to do but to execute judgment or decree it already rendered. (Whiting *vs.* Bank, 13 Pet. 15: Forgay *vs.* Conrad, 6 How. 204: Craighead *vs.* Wilson, 18 How. 201: Beebe *vs.* Russel, 19 How. 285: Thompson *vs.* Dean, 7 Wall 345: St. Clair Co. *vs.* Livingston, 18 Wall 628: Parcels *vs.* Johnson, 20 Wall 654: R. R. Co. *vs.* Swasey, 23 Wall 409: Crosby *vs.* Buchanan, 23 Wall 453: Commissioners *vs.* Lucas, 93 U. S. 113.) It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases, on that subject, but in the common law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final.

Bostwick et. al. *vs.* Brinkerhoff, 106 U. S., 3.

A decree to be final so as to give this court jurisdiction on appeal must terminate the litigation of the parties on the merits of the case, so that if there should be an affirmance here, the Court below would have nothing to do but execute the decree already rendered.

A decree in a foreclosure suit, which does not order a sale of the property but overrules the defense set forth in the cross-bill, and declares that the appellee is the owner of the debt secured, and refers the case to an auditor to ascertain the amount due thereon, the existence, amounts and priorities of liens, and the claims for taxes, is not a final decree.

Grant *vs.* Insurance Co., 106 U. S., 429.

This rule is again stated and affirmed in

St. L. & I. M. R. R. Co. *vs.* Express Co., 108 U. S., 24.

Ex parte Norton, 108 U. S., 237.

A judgment is final for the purposes of a writ of error to this Court, which terminates the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the Court below would have nothing to do but to execute the judgment it had already rendered.

Mower *vs.* Fletcher, *et al.*, 114 U. S., 127.

Cases where judgment was held to be interlocutory and not final.

A judgment of reversal accompanied by an order remanding the cause for a retrial is not a final judgment for the purposes of a writ of error.

Johnson *vs.* Keith, 117 U. S., 199.

An affirmance by the Supreme Court of the District of Columbia at a general term of the decree of that Court at a special term deciding a question of domicile and thereby affirming the jurisdiction of the Court, is not a final decree for the purpose of an appeal to this Court.

Benjamin *vs.* DuBois, 118 U. S., 46-48.

A decree entered in proceedings to foreclose a railroad mortgage, which ascertains the amount due and orders its payment by a day certain, but which does not fully identify the property, nor determine the extent and amount of prior liens, what the order of sale shall contain, nor what shall be the form of advertisement for the sale, is not final for the purposes of an appeal.

E. D. of Pa.

Parsons *vs.* Robinson, 122 U. S., 116.

Burlington *vs.* Simmon, 123 U. S., 52.

The decree is not final and is not appealable where the action is for an injunction restraining defendant from committing further trespasses on the mineral and ore lands or removing the same and for an account of the quantity and value of the ore taken from the land by the defendant and the decree grants the injunction, and orders an accounting, but the account remains to be taken.

Keystone Manganese & Iron Co. *vs.* Martin, 132 U. S., 92.

A judgment of the Supreme Court of Minnesota affirming with costs an order of the County District Court of that state which overruled a demurrer is not a final judgment reviewable in this Court.

Meagher *vs.* Manufacturing Co., 145 U. S., 611.

A decree is interlocutory whenever an inquiry as to matter of law or fact is directed preparatory to a final decision.

Beebe *vs.* Russell, 19 How, 283 (U. S.).
Pulliam *vs.* Christian, 6 How, 209 (U. S.).

If the decision or judgment leaves some matter involved in the controversy open for future hearing and determination before the ultimate rights of the parties are conclusively adjudicated, it is an interlocutory and not a final decree.

Merriman *vs.* R. R. Co., 64 Fed. Rep., 535.

If the main purpose of a bill is to obtain an account between the parties and a recovery of the balance that shall be found due, a decree that the complainant is entitled to the accounting and that the case be referred to a master to state the account is not final.

Latta *vs.* Kilburn, 150 U. S., 524-539.

What then is the order from which these writs are sued out, and which are now before the Court for review?

It is an order to produce certain papers in the exclusive possession of the Pennsylvania Railroad Company, which contain evidence pertinent to the issue to be tried in the action pending in which the order was applied for and granted.

It must be remembered that no steps had been taken in the Court below for the compulsory enforcement of the order before the writ of error was sued out and served. The record will disclose the fact stated to be true, and therefore the only act of the Court that can be the subject of complaint is the awarding of the order to produce.

No attachment or process of the Court of any kind has been applied for to enforce obedience to the order of the Court, and except the suing out of this writ of error, there has been no positive act of refusal to produce and none is disclosed by the record.

It cannot be alleged that the appellants have suffered any injury or have been punished in their persons, or that they have been damaged in their estates. This being true, how then can this be more than an interlocutory order, one which is not appealable?

But it seems to us that this is no longer a debatable question.

In *Alexander, appellant, vs. The United States (No. 381, October Term, 1905)*, Supreme Court of the United States. (Opinion delivered March 12, 1906.) The facts stated in the opinion of the Supreme Court, as delivered by Mr. Justice McKENNA, are strikingly similar to the facts in this case under review. After the opening sentences of the opinion, which is in these words: "At the very beginning "we encounter a question of jurisdiction. Are the orders "of which the appellants complain appealable?" the learned Judge proceeds to state the case, and then declares: "As we have said, the Court entered orders requiring the "appellants to answer the questions put to them and to pro- "duce the books, papers and documents requested. Appeals "were allowed to this Court. To justify the appeals appel-

"lants contend that the orders of the Circuit Court constitute "practically independent proceedings and amount to final "judgments. To sustain the contention *Interstate Com-"merce Commission vs. Brimson* (154 U. S., 447) and "*Interstate Commerce Commission vs. Baird* (194 U. S., "25), are cited.

"Those cases rested on statutory provisions which do "not apply to the proceedings at bar, and, while there may "be resemblance to the latter, there are also differences. In "a certain sense finality can be asserted of the orders under "review, so, in a certain sense, finality can be asserted of "any order of a court. And such an order may coerce a "witness, leaving to him no alternative but to obey or be "punished. It may have the effect and the same char-"acteristic of finality as the orders under review, but from "such a ruling it will not be contended there is an appeal. "Let the court go farther and punish the witness for con-"tempt of its order, then arrives a right of review, and this "is adequate for his protection without unduly impeding the "progress of the case. Why should greater rights be given "a witness to justify his contumacy when summoned before "an examiner than when summoned before a court? Testi-"mony, at times, must be taken out of court. In instances "like those in the case at bar the officer who takes the testi-"mony, having no power to issue process, is given the aid "of the clerk of the court of the United States; having no "power to enforce obedience to the process or to command "testimony, he is given the aid of the judge of the court "whose clerk issued the process, and if there be disobedience "of the process, or refusal to testify or to produce docu-"ments, such judge may 'proceed to enforce obedience * * * " 'or punish in like manner as any court of the United States " 'may proceed in case of disobedience to like process issued " 'by such court.' (Sections 868, 869 Revised Statutes.) "This power to punish being exercised the matter becomes "personal to the witness and a judgment as to him. Prior "to that the proceedings are interlocutory in the original

"suit. This is clearly pointed out by Circuit Court Judge "VAN DEVENTER, disallowing an appeal from an order like "those under review, in the case of *Nelson vs. United "States* (No. 490), in error to the Circuit Court of the "United States for the District of Minnesota. The learned "Judge said: 'I am of opinion that the mere direction of the " 'court to the witnesses to answer the question put to them " 'and to produce the written evidence in their possession is " 'not a final decision; that it more appropriately is an inter- " 'locutory ruling or order in the principal suit, and that if " 'the witnesses refuse to comply with it and the court then " 'exercises its authority either to punish them or to coerce " 'them into compliance that will give rise to another case " 'or cases to which the witnesses will be parties on the one " 'hand and the Government, as a sovereign vindicating the " 'dignity and authority of one of its courts, will be a party " 'on the other hand. I have no doubt that a judgment " 'adverse to the witnesses in that proceeding or case will be " 'a final decision and will be subject to review by writ of " 'error, but not by appeal. My opinion is also that the " 'parties to the principal suit cannot appeal or obtain a writ " 'of error from that decision.'.

"See also Logan *vs.* Penn. R. R. Co. (132 Pa. St. 403, "410).

"This court having no jurisdiction, the appeals must be "dismissed, and it is so ordered."

We also cite the following Pennsylvania cases:

Franklin Twp. *vs.* Osler, 91 Pa. 160.
Cake *vs.* Cake, 106 Pa. 472.
O'Hara *vs.* Penna R. R. 2 Grant (Pa.) 241.
Chadwick *vs.* Ober, 70 Pa. 264.
Gilpin *vs.* Howell, 5 Pa. 40-41.
Cowles *vs.* Cowles, 2 P. & W. (Pa.) 139.
Bossler *vs.* Johns, 2 P. & W. (Pa.) 331.

III.

We pass now to notice the remaining positions of the argument of the learned counsel. We do not, however, by so doing desire to be understood as in any wise waiving the question of the jurisdiction which we have discussed.

It is earnestly contended for the plaintiffs in error, that the court, assuming it had the power under the Revised Statutes Sect. 724 to compel the production of the "daily distribution" sheets, could not rightfully compel their production at a time prior to the actual trial of the cause and therefore the court erred in its order.

This contention is clearly error in the light of the weight of authority, and much more is it evident by the examination of the very luminous opinion of Mr. Justice BRADFORD, of the District Court of Delaware, sitting in the Circuit Court, filed in the case of Victor G. Bloede Co. *vs.* Joseph Bancroft Sons. (See 98 Fed. Rep. 175-176.)

To cite the entire opinion of Justice BRADFORD, would enlarge this brief to an undue extent. We, therefore, quote as briefly as we can therefrom. After stating the case, the learned Judge (see page 177 of Fed. Rep. *supra*) says,

"There has been much contrariety of judicial opinion "on the question whether this section authorizes an order "for the production before trial of books or writings. Its "phraseology is unfortunate and calculated to shroud its "meaning in doubt. It is, however, remarkable in view of "the antiquity of the law and of the number of cases which "have arisen requiring its construction that its intent on the "point under discussion is still the subject of controversy. "The weight of authority throughout the country taken as a "whole as well as of reason appears to support the proposi-"tion that the section confers authority on the Federal "Courts in civil actions at law to order in proper cases pro-"duction of books and writings containing pertinent evi-"dence, not only at the trial, but after the joining of issue

"and before trial for inspection in order to prepare for trial. "In Geyger's Lessee *vs.* Geyger, 2 Dall., 332, Fed. Cas. No. "5,375, where the original section was under consideration, "the Circuit Court for the District of Pennsylvania, in 1795, "broadly declared the purpose of the law as follows:

" 'The provision contained in the judicial act was in-
" 'tended to prevent the necessity of instituting suits in
" 'equity merely to obtain from an adverse party the pro-
" 'duction of deeds and papers relative to the litigated issue.'

"In Black *vs.* Tayloe, 2 Cranch, C. C. 427, Fed. Cas. "No. 2,548, decided in the Circuit Court for the District of "Columbia in 1823, there was a motion for production before "trial. Geyger's Lessee *vs.* Geyger was cited in opposition. "The Court, however, ordered the defendant to produce his "bank book and vouchers prior to the trial 'for the inspection
" 'of the plaintiff's counsel in the presence of the defendant's
" 'counsel, if he wished to be present.' In Jacques *vs.* Col-"lins, 2 Blatchf. 23 Fed. Cas. No. 8,167, the Circuit Court for "the Southern District of New York, in 1846, granted an "application that certain correspondence and documents be "produced before trial for inspection, or that service be made "before trial of verified copies of the same to enable the "defendants to prepare for trial."

The opinion then reviews practically all the cases on both sides of the disputed question, and not only distinguished the cases but clearly points the reasons for reaching the conclusions arrived at.

We also cite the following Federal decisions to the same effect:

Bank *vs.* Cattle Co., 61 Fed. Rep., 190.
Lucker *vs.* Assurance Co., 67 Fed. Rep., 18.
Henzey *vs.* Coal Co., 80 Fed. Rep., 178.
Gray *vs.* Schneider, 119 Fed. Rep., 474.

In each of these cases the order was made compelling production before trial.

No better illustration could be made of the absolute justice and fairness of this practice than under the facts disclosed in the petition of the defendant in error, none of which are denied by the answer filed. These "daily distribution" sheets covering the period of time mentioned in the statement of the cause of action and in the petition asking for production, inspection and examination, number more than one thousand. They contain the records of the whole number of coal cars distributed in the region each day, as well as the number distributed to each shipper in the region. Much thereon is doubtless immaterial to the plaintiffs; but so far as they contain the record of the whole number of coal cars, the percentage which each coal shipper was entitled to, the number distributed to the favored shippers and the number distributed to the plaintiffs, these records are not only pertinent but vital. To produce them at the trial, and not before, is to entail not only an unreasonable amount of confusion but delay and injustice. And the order is not only in the interest of justice, but of a reasonable speedy trial.

We assert with unlimited confidence that the Court not only had the power to make the order, but that the ends of justice and a fair and speedy trial required and justified the same.

IV.

We come now to the remaining question so learnedly presented by the distinguished counsel for the plaintiffs in error. As we understand the contention in error, it has a two-fold aspect:

(*a*) That the actions against the defendant, the Pennsylvania Railroad Company, are for a penalty.

(*b*) That the defendants in error in this proceeding and writ under review are immune and that they may plead this immunity to protect the corporation.

To the first proposition we say that this cannot be sustained.

It is true that at common law the Pennsylvania Railroad Company did not owe to the Pennsylvania Coal and Coke Company or Webster Coal & Coke Company the duty of a pro rata distribution of its coal cars, day by day. But being a common carrier and its road a public highway, the common law forbids and prohibits the carrier from making unjust discriminations in furnishing facilities for transporting goods and in charges for transportation. The authorities agree that unjust discrimination is forbidden.

Mogul, etc., R. R. Co. *vs.* McGregor, L. R. 21, Q. B. D. 544.

Evershed *vs.* London, etc., R. R., L. R. 3, Q. B. D. 134.

Roxendale *vs.* Eastern R. R., 4 Com. B. (U. S.), 62.

Bramley *vs.* Southeastern R. R., 12 Com. B. (U. S.), 63.

Louisville, etc., R. R. *vs.* Wilson, 132 Ind., 517.

New England, etc., R. R. *vs.* Maine R. R., 57 Maine, 188.

Cases might be multiplied indefinitely. It is true that there is some diversity of opinion as to what constitutes unjust discrimination.

What is known as the "Interstate Commerce Act" in the second and third section did no more than to define what constitutes unjust discrimination. That when certain acts were done by the carrier, or were not done, that then the unjust discrimination existed for which an action at law might be brought.

It cannot be contended, however, that if an action was brought for unjust discrimination at common law, that the compensation an aggrieved party might recover was the enforcement of a penalty. The reason is, that the common law implies a contract between carrier and shipper that the carrier will not unjustly discriminate against the shipper, and for a violation of this implied contract the law awards compensation, called damages, and this is no more a penalty than the compensation which the law awards to an aggrieved party for the violation of any other written or implied contract, in a penalty.

It is true that the Interstate Commerce Act, by subsequent sections, does say the violations of any of its provisions may be "deemed guilty of a misdmeanor and shall "on conviction thereof in any district court of the United "States within the jurisdiction of which such an offense "was committed be subject to a fine not exceeding five thou-"sand dollars, &c."

But the record discloses that the action brought is not for the enforcement of the penalty. It is to recover only compensation for the loss suffered by reason of the unjust discrimination of the carrier. The fact that the Act of Congress defines what is unjust discrimination, for which an action will lie, does not create a penalty out of the sum awarded the aggrieved party for his compensation for the loss he shows he has sustained.

We contend there is a clear distinction in this respect between the actions pending in the Circuit Court and any decided cases in the books holding that the Act of Congress is a penal statute. If the action were in the district court to convict the carrier of a misdemeanor under the 10th section, then the proceedings would justly be styled an action to enforce a penalty.

We come now to notice the second part of the contention included in this part of the argument by the distinguished counsel.

(b) That the defendants in error in this proceeding are not only immune, but that they may plead this immunity to protect the carrier.

No statement that we can make so fully and completely refutes the argument of the counsel as the language of Mr. Justice BROWN, of the Supreme Court of the United States.

In the case of *Edwin F. Hale*, appellant, *versus William Henkel, U. S. Marshal* (No. 340, October Term, 1905), of the Supreme Court, being an appeal from the Circuit Court of the United States for the Southern District of New York, which was an order to produce certain documentary papers, books, etc., and which were the property of Forbes, Andrews & Co., a subordinate concern of the American Tobacco Company, and which the witness Hale refused to produce, and the Court held him to be in contempt for his refusal, and committed him to the custody of the Marshal, Mr. Justice BROWN, after stating the facts and reviewing the law in the cases cited by the counsel and pointing out their inapplicability to such an order as was there made and is now under review, and holding that the witness, an agent and officer of the corporation, could not refuse to produce the papers, further said: "If, whenever "an officer or employe of a corporation were summoned "before a grand jury as a witness he could refuse to produce "the books and documents of such corporation, upon the "ground that they would incriminate the corporation itself, "it would result in the failure of a large number of cases "where the illegal combination was determinable only upon "the examination of such papers. Conceding that the wit-"ness was an officer of the corporation under investigation, "and that he was entitled to assert the rights of the cor-"poration with respect to the production of its books and "papers, we are of the opinion that there is a clear distinction "in this particular between an individual and a corporation, "and that the latter has no right to refuse to submit its "books and papers for an examination at the suit of the

"State. The individual may stand upon his constitutional "rights as a citizen. He is entitled to carry on his private "business in his own way. His power to contract is "unlimited. He owes no duty to the State or to his neigrbors "to divulge his business, or to open his doors to an investi- "gation, so far as it may tend to criminate him. He owes "no such duty to the State, since he receives nothing there- "from, beyond the protection of his life and property. His "rights are such as existed by the law of the land long ante- "cedent to the organization of the State, and can only be "taken from him by due process of law, and in accordance "with the Constitution. Among his rights are a refusal "to incriminate himself, and the immunity of himself and "his property from arrest or seizure except under a war- "rant of the law. He owes nothing to the public so long "as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of "the State. It is presumed to be incorporated for the benefit "of the public. It receives certain special privileges and "franchises, and holds them subject to the laws of the State "and the limitations of its charter. Its powers are limited "by law. It can make no contract not authorized by its "charter. Its rights to act as a corporation are only pre- "served to it so long as it obeys the laws of its creation. "There is a reserved right in the Legislature to investigate "its contracts and find out whether it has exceeded its "powers. It would be a strange anomaly to hold that a "State, having chartered a corporation to make use of cer- "tain franchises, could not, in the exercise of its sovereignty, "inquire how these franchises had been employed, and "whether they had been abused, and demand the production "of the corporate books and papers for that purpose. The "defense amounts to this: That an officer of a corporation "which is charged with a criminal violation of the statute "may plead the criminality of such corporation as a refusal "to produce its books. To state this proposition is to an- "swer it. While an individual may lawfully refuse to an-

"swer incriminating questions unless protected by an immu-
"nity statute, it does not follow that a corporation, vested
"with special privileges and franchises, may refuse to show
"its hand when charged with an abuse of such privileges.

"It is true that the corporation in this case was char-
"tered under the laws of New Jersey, and that it receives its
"franchise from the Legislature of that State; but such fran-
"chises, so far as they involve questions of Interstate Com-
"merce, must also be exercised in subordination to the power
"of Congress to regulate such commerce, and in respect to
"this the general government may also assert a sovereign
"authority to ascertain whether such franchises have been
"exercised in a lawful manner, with a due regard to its own
"laws. Being subject to this dual sovereignty, the general
"government possesses the same right to see that its own
"laws are respected as the State would have with respect
"to the special franchises vested in it by the laws of the
"State. The powers of the general government in this par-
"ticular in the vindication of its own laws are the same as
"if the corporation had been created by an Act of Congress.
"It is not intended to intimate, however, that it has a gen-
"eral visitatorial power over State corporations."

We contend, therefore, that the persons named in the order, who are the official heads of the special department of the Pennsylvania Railroad, by which the transportation of freight is carried on, are not at liberty to refuse to produce the papers of the corporation called for by the order to produce in this case, because in their individual capacities as distinguished from mere agents of the corporation they are fully protected by their personal privilege to be immune from any future action; but that this is distinctly a personal privilege which they cannot plead to protect the corporation.

Respectfully submitted,

DAVID L. KREBS,
Of Counsel for Appellees.

No. . OCTOBER TERM, 1906.

No. [redacted]

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

Office Supreme Court, U. S.
FILED.
APR 20 1907
JAMES H. McKENNEY,
Clerk.

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. C. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Roberts, and R. L. Head, Plaintiffs in Error,

vs.

Pennsylvania Coal and Coke Company, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

BENJAMIN S. HARMON,
JOHN W. GRIGGS,
DAVID L. KREBS,
GEORGE S. GRAHAM,
Counsel for Defendant in Error.

Allen, Lane & Scott, Prs., Phila.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

October Term, 1906. No. .

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Roberts, and R. L. Head, Plaintiffs in Error,

vs.

Pennsylvania Coal and Coke Company, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

The plaintiffs in error have divided their argument into four propositions, as follows:—

First.—"The order is directed to and against individuals and not to and against a party to the cause, as required by Section 724."

Second.—"The action in which the order complained of was entered is a penal action, and therefore Section 724 is not applicable."

Third.—"Section 724 does not authorize an order for production of books and papers prior to the trial of the cause."

Fourth.—"The car distribution orders of the defendant whose production is ordered by the court below do not contain evidence pertinent to the issue."

There is added a fifth heading, which bears upon the petition to quash the appeal, filed by the defendant in error, which is as follows:—

"The order entered by the court below is, in substance, a final definitive order or decree against the plaintiffs in error, from which a writ of error will lie."

This last proposition is really the only one which it is necessary to discuss at this time and in the present state of the record, because the order from which the appeal in this case was made is an interlocutory decree, and absolutely stamped as such by the decision of the United States Supreme Court.

In taking up the argument of this case it might be well to answer briefly the proposition made by the plaintiffs in error which go to the merits of the controversy but which are really not presented by the present appeal.

THE FIRST PROPOSITON is that "The order is directed to and against individuals and not to and against a party to the cause, as required by Section 724." (Page 4 Brief of Plaintiffs in Error.)

There is really nothing in the argument which the plaintiffs in error have made in support of this proposition, which requires any reply. A number of cases have been quoted in which orders were attempted to be made upon *agents of individuals* and cases where an order was attempted to be made on a corporation where the officer and not the corporation was the defendant or party to the litigation. It was not necessary to quote cases showing that in such matters no order would be made. The case at bar is an entirely different proposition. Here is a cor-

poration which acts through its officers, and the decree that is made in this case commands Alexander J. Cassatt as *president* of the Pennsylvania Railroad Company to produce books, papers, &c., of the Pennsylvania Railroad Company. The books of the Railroad Company are in the custody, possession and control of its officers and employees, and only by directing the officers and employees to produce the books, papers, &c., could the order be made absolutely effective. Besides this, this conforms to the letter and spirit of Section 724, which makes the proceeding under said section analogous to the chancery proceedings. It matters not that the plaintiffs in error may attempt to prove that the reason for the chancery procedure would be different from the reasons for procedure in this case—the result in the chancery procedure would be that the officers of a corporation would be made parties defendant whenever the corporation was a defendant and could be subjected to the orders of the court. The Section says you shall follow the procedure in chancery. Therefore, it is immaterial what the reason for the practice in chancery was. The practice itself is that the officers are made parties defendant in such cases.

THE SECOND PROPOSITION is: "That action in which the order complained of was entered is a penal action, and therefore the remedy prescribed by Section 724 is not applicable." (Page 8 Brief of Plaintiffs in Error.)

A great many cases of more or less application to this proposition have been inserted in the brief of the plaintiffs in error. The most important case quoted by them, is the case of Parsons *vs.* Railway Co., 167 U. S., 447. This is undoubtedly conceived by the plaintiffs in error to be the most important case, because they devote nearly three pages of their brief to the opinion of Mr. Justice Brewer, and we concede that it is the most important case for the plaintiffs in error, because if they cannot secure any comfort from Parsons' case their second proposition must fail entirely.

Now, what did the case of Parsons *vs.* The Railway decide?

In the first place, that case did not undertake to deal with a construction of Section 724, U. S. Revised Statutes, but was dealing with the question as to whether the plaintiff had properly set out a cause of action and had sufficiently proved the same.

In the second place, Justice Brewer did not decide that the right of action springing from the Interstate Commerce law was a penalty, but he says in the Parson case "That this claim (referring to the claim in the Parsons case) is in the nature of a penalty," and, of course necessarily, in the discussion of the question he stated what was the law as to proofs governing cases involving the enforcement of a penalty. There is no complaint against his law as relating to penalties. Our criticism rather is that the question that is presented in the case at bar was not presented or passed upon in the Parsons case. The point involved in the case at bar is whether the production of the books, &c., can be refused because the main action involved a penalty, and it might be well here to advert to the fact that under the rules of the Court of Chancery, discovery was only refused in cases where there was no doubt of the action being for a penalty or forfeiture, and this immunity given by the Court of Chancery was based upon the proposition that a man could not be compelled to incriminate himself. But a reference to the cases decided by the Court of Chancery will show that when a superior public policy was involved, then the immunity from giving discovery in cases of penalties and forfeitures was overcome. Thus, in the case of Dummer *vs.* Corporation of Chippenham, 14 Vesey, 245 (Lord Eldon), it was stated that discovery always could be compelled in chancery in cases of conspiracy, and by the said judge, in McCauley *vs.* Shackell, 1st Bligh, New Series, 96, it was held that discovery was always compelled in cases of fraud. This was based upon the principle that in the above mentioned class of cases, where the acts are done secretly, you must not close the avenue of investigation, or else the substantive prohibition against fraud, &c., would be a dead letter. The same reason is given in the case of Hale *vs.* Henkel, U. S. Supreme Court, Oct. Term,

1905, No. 340, opinion delivered March 12th, 1906. Justice Brown in his opinion used the following language:—

> "Of what use would it be for the legislature to declare these combinations unlawful, if the judicial power may close the door of access to every available source of information upon the subject?"

The case of Hale *vs.* Henkel was a prosecution under the Sherman Act. It is upon this principle of a public policy superior to the public policy which gave immunity from discovery in chancery, that the production of books is asked in this case. The Interstate Commerce Act was born in public policy and is nurtured in public policy, and, as Justice Brown said with reference to the Sherman Act, its provisions should not be frittered away or nullified by the judicial powers closing the avenues of proof. In other words, Lord Eldon when confronted by the principle of public policy which gave immunity from discovery decided that the public policy which favored the discovery and prevention of fraud was greater that the immunity—and that the doctrine of public policy behind the immunity gave way before the necessity for detecting and hindering conspiracy and fraud.

In the same way the United States Supreme Court, in the case of Hale *vs.* Henkel (Paper Trust case above quoted) made the principle of immunity from discovery subservient to the requirements and necessities of enforcing the Sherman Act. Now, we ask that the court make the principle of immunity from discovery subservient to the necessity and requirement of enforcing the Interstate Commerce Act, which declares the ruling public policy. It might be added that Justice Brewer, whose *dicta* in the Parsons case, and it is respectfully submitted that it is merely *dicta* dissented in the Paper Trust cases above referred to; and his dissenting opinion in the Paper Trust cases shows the trend of his mind on this subject, which no doubt gave rise to the *dicta* in the Parsons case. Who can doubt that, if at the present day in a Court of Chancery the proposition was presented that discovery was

needed to enforce a provision of the Interstate Commerce Act, the court would order and enforce discovery in this connection as tending to establish clearly what the public policy of to-day is upon this subject, it is well to remember that both the Interstate Commerce Act and the Sherman Act provide immunity to witnesses called to testify in connection with cases arising under either. The entire purpose of the lawmakers was to afford the widest possible avenue in the investigation of all matters necessary to enforce the doctrine of public policy announced in these statutes.

Discrimination and inequity had grown to be enormous evils threatening public welfare and destroying the rights of individuals to such an extent that it became absolutely necessary to attempt to destroy these evils by rigid laws forbidding all the underlying practices which produced them. The matter covered by the two laws above adverted to, present the foremost and most important questions of the day.

Over and above all this, in the case at bar the statement filed shows that the claim is for *actual damage*, and not for any penalty or anything in the nature of a penalty that is provided for in the Interstate Commerce Act, so that apart from all the discussion as to the law relating to penalty, no penalty is asked in the case at bar. What is asked is compensation for actual damage sustained.

Thus, in Moelling *vs.* Lehigh Coal and Navigation Company, 9 Phila., page 223, the present Chief Justice of the Supreme Court of Pennsylvania (then Judge) Mitchell, decided that defendants might be compelled to disclose violations of the copyright and patent laws, provided the bills waived the forfeiture and penalties incurred and sought only damages. on the principle that where the claim is for compensation for actual injury sustained, there is no penalty or forfeiture involved, and therefore discovery should be had.

The case of Finch *vs.* Rikeman (page 8, Brief of Plaintiffs in error) is quoted by Justice Mitchell in the above case as confirming the doctrine which he therein announces; and yet the plaintiffs in error quote it for the

very reverse purposes. In that case, it was said the defendants might be compelled to disclose violations of the copyright and patent laws, provided the bills waived the forfeitures and penalties incurred, and sought only damages. The long quotation at page 7 in the brief of the plaintiffs in error is therefore wholly inapplicable to the question now before the court, but the case is one which supports the order of the court below. The case of U. S. *vs.* National Lead Co., quoted at page 10 in the brief of the plaintiffs in error is not an analogous case and the *dicta* of the court is wholly inapplicable to the present contention. From the nature of that case it is easy to see that the production of the documents, would tend to show the commission of a crime by the defendants, and that therefore on that ground no order would be made. In part of the quotation it is said, compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers to convict him of crime, or to forfeit his property is contrary to the principles of free government. Now this doctrine is one to which the defendant in error will most cordially subscribe, as an accurate statement of the law with reference to crime and forfeiture. But there is nothing in the case at bar savoring of crime and forfeiture. The plaintiff in error contends that the right of action created by sections two and three of the Interstate Commerce Act (pages 12 and 13 of the brief of the plaintiffs in error) is a right of action unknown at common law and is the creation of a penal statute and therefore the plaintiff is not entitled to the remedy conferred by Section 724. Without discussing the question that a common carrier under the common law was only bound to make reasonable charges and was not liable to carry out equal rates and terms for all customers, and notwithstanding the declaration in some of the cases quoted in brief of plaintiffs in error that no remedy existed in common law to correct the evil of unequal rates or discrimination, it is contended that a very strong argument can be advanced supporting the view that the plastic principles of the common law were sufficiently broad and comprehensive to cover these

evils as well as that of charging unreasonable remuneration. The absence of precedent is undoubtedly due to the fact that during the period referred to, these evils of to-day were practically unknown. The movement toward combination and monopoly which is a growth of the last decade or two in the history of the civilized world, had not yet developed these evils hence the absence in the common law of precedents touching them. But assuming that the law was as claimed by the plaintiffs in error, it requires but little reflection to discover that the statutes in question when abrogating the privilege of the common carrier to make unequal rates and discrimination between customers were not dealing with penalty but simply dealing with a civil right. If a man could under the common law sue for damages because of unreasonable charges and not be attempting to collect a penalty equally so a man who now brings suit under the Interstate Commerce Act to recover compensatory damages cannot be accused of attempting to collect a penalty. There was a time in the history of the law when an action for damages resulting from personal injuries, died with the death of the party injured, but the law provided in its wisdom that the action should survive to certain legal representatives. Did this statute inflict a penalty upon any one? Did it not simply provide a remedy for an injury which theretofore could not be asserted in the courts? Is not the result of the Interstate Commerce Act merely to provide a remedy for an injury that was clearly real and existent but remediless before its passage? The argument seems to be fallacious therefore that this action is the creation of a penal statute. It certainly is the result of a regulating statute which defines the duties of common carrier and as our claim is that the Interstate Commerce Act is merely declaratory of the common law, although this claim is not essential to the validity of our argument which is, that whether the injury is one that existed under the common law and was simply without remedy, or whether the injury as well as the remedy was created by the statute, it does not follow that because of this creation of modern legislation that the action is necessarily penal. It certainly cannot be con-

tended that there is anything involved in the case at bar which shows that the plaintiffs in error are asked to produce books and papers to convict them or any of them of crime or subject them to forfeiture of their property. The doctrine of immunity upon which reliance is placed for a denial of discovery in this case finds its active expression in the fifth amendment to the Constitution of the U. S. It has been judicially determined in Hale *vs.* Hinkle, decided March 12th, 1906, by the Supreme Court of the United States that the fifth amendment is purely a personal privilege of the witness, and that this cloak of protection cannot be claimed by a corporation, and further an individual cannot plead the fact that some third person or corporation might be incriminated; so that the immunity in question is clearly restricted to the personal privileges of the witness. This doctrine of immunity therefore cannot be claimed for the defense of the Pensylsylvania Railroad corporation, indeed the Pennsylvania Railroad Company is not a party to this appeal. It has no immunity under the Constitution or the policy of the common law. The record in this case will be searched in vain to find a single word or sentence that presents a personal claim on the part of any one of the plaintiffs in error that the production of the books and papers in question would incriminate them or work a forfeiture of their property.

Section 10 of the Interstate Commerce law is invoked in aid of the argument that the suit in this case is to enforce a penalty. The only penalties denounced are those contained in Section 10. Section 10 clearly applies to controversies or prosecutions between the Government, whose law has been violated, and the culprit who has offended against the law. If this were a case brought under Section 10, then the argument of the plaintiffs in error would have some weight and be entitled to some consideration. But the claim in this case is made under the authority given in Section 8 of the Interstate Commerce Act and this is purely a civil right for compensatory damages.

THE THIRD PROPOSITION is: "Section 724 does not authorize an order for production of books and papers prior to the trial of the cause." (Page 21, Brief of Plaintiffs in Error.)

Several cases are quoted in the brief of the plaintiffs in error in support of this propositon, and the plaintiffs in error suggest that different circuits have decided differently on this question of "production before trial." It seems to us there can be no question about the later decisions in all the circuits and the uniform practice following such decisions, which is that the production of books and papers will be ordered before the trial of the cause, and it will save time to refer to one special case on this subject, which gives the reason for the rule, and that is the case of Bloede *vs.* Bancroft, 98 Federal Reporter, 175 (1899). This is probably the best considered case in the books. The opinion is by Judge Bradford, and after an elaborate review of all the cases he decided that the defendant is required to produce the books and papers prior to the date set for trial. How far in advance of trial, of course, depends upon the circumstances of each case. Any other rule of practice would practically annul the statute and deprive suitors of the remedy which the law clearly intended to provide.

THE FOURTH PROPOSITION is: "The car distribution orders of the defendant, whose production is ordered by the court below, are not "evidence pertinent to the issue." (Page 25, of Brief of Plaintiffs in Error.)

This proposition really needs no reply. The car distribution orders are the first step in the discrimination, and each step is logically followed out until the cars are filled with coal and consigned to market. A mere statement of the proposition and a mere mention of car distribution orders we think is sufficient to show the relevancy of the orders as a step in proving discrimination.

THE FIFTH PROPOSITION is: "The order entered by the court below is, in substance, a final definitive order or decree against the plaintiffs in error, from which a writ of error will lie." (Page 26, of Brief of Plaintiffs in Error.)

This is the real proposition in the case, and it is directly raised upon the petition of the defendant in error, asking the court to quash this appeal. The allegation of the defendant in error is that the order appealed from is an *interlocutory order*, from which no appeal will lie. A copy of the motion to quash and reasons in support thereof is appended to this paper book.

There can be two views taken of this transaction, the first being that the court is confined in the penalty for disobedience of the order to the punishment recited in the section, to wit: "If a defendant fails to comply with such order the court may, on motion, give judgment against him in default." The second is that in addition to that the court may punish the party refusing to obey the order by adjudging him guilty of contempt, and fine or imprison him, as the case may be.

If the first proposition is taken as the true statement of the law, then in the case of Pennsylvania Coal and Coke Company *vs.* the Pennsylvania Railroad Company, there must have been a judgment entered in default against the Pennsylvania Railroad Company for its failure to obey the order, and until that is done there is no final judgment, and it might be well to state here that the provision of Section 724 is ancillary to and in connection with the main case and is an order that grows out of the main case. It is not like a bill of discovery, which is a separate proceeding, and from which decree a person may appeal before the main case is settled. Indeed the object of Section 724 was to work out the result by a short and quick method in lieu of the long and cumbersome bill of discovery process, and any order made under Section 724 must await the determination of the main case before an appeal can be had, and when the main case is appealed, then all of the itnerlocutory orders or decrees can be reviewed together in the Appellate Court. Indeed, you could go further and hold that even if the party who refused to produce was punished for contempt there could be no separate appeal from that judgment, because the punishment for contempt would be ancillary to the main case in a civil action. It is needless for us to state

to this court that there is a difference between a punishment for contempt in a criminal case, which undoubtedly gives right to the separate appeal when the punishment has been inflicted, and the case where the punishment for contempt is upon an order which grows out of and is ancillary to a civil case. But without discussing the question any further as to the difference between a punishment for contempt in a criminal case and in a civil case, the fact remains that there was no attempt to punish for any contempt in this case, and the plaintiffs in error really made no reply of any kind or character to the order appealed from, so that the time for appeal or writ of error has not yet arisen and will not arise until final judgment in the case, and the final judgment, whether on default for failure to produce the books, or after hearing upon the merits of the case, is a final judgment in the main case itself, and the judgment entered by reason of the defualt is just as much a conclusion of the main case as if the judgment had been rendered after hearing.

If, on the other hand, you take the second proposition above stated, that in addition to the penalty that can be inflicted by the judgment in default, the court can also punish the party who disobeys the order to produce, then under the case of Alexander *vs.* the U. S., 201 U. S. Reports, page 117 the time for an appeal has not yet arisen, because the court must proceed to punish for contempt before the plaintiffs in error would have any right to an appeal, and when the time for that appeal does arrive, it cannot be based upon any failure of the parties to the main suit to do or not to do any particular thing, but would be a case between the majesty of the law on the one hand and the recalcitrant person who disobeys its orders on the other hand. It would, perhaps, be well to quote that portion of the opinion in the Alexander case which deals with this question. It is as follows:—

> "As we have said, the court entered orders requiring the appellants to answer the questions put to them and to produce the books, papers and documents requested. Appeals were allowed to this court.

To justify the appeals, appellants contend that the orders of the Circuit Court constitute practically independent proceedings and amount to final judgments. To sustain the contention, Interstate Commerce Commission *vs.* Brimson (154 U. S. 477), and Interstate Commerce Commission *vs.* Baird (194 U. S. 25) are cited.

Those cases rested on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences. In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go farther and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case. Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court? Testimony, at times, must be taken out of court. In instances like those in the case at bar the officer who takes the testimony, having no power to issue process, is given the aid of the clerk of a court of the Unted States; having no power to enforce obedience to the process or to command testimony, he is given the aid of the judge of the court whose clerk issued the process, and if there be disobedience of the process, or refusal to testify or to produce documents, such judge may 'proceed to enforce obedience * * * or punish disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court.' (Sections 868, 869, Revised Statutes.) This power to punish being exercised the matter becomes personal to the witness and a judgment

as to him. Prior to that the proceedings are interlocutory in the original suit. This is clearly pointed out by Circuit Judge Van Deventer, disallowing an appeal from an order like those under review, in the case of Nelson *vs.* United States (No. 490), in error to the Circuit Court of the United States for the District of Minnesota. The learned judge said:—

"'I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the Government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witness in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision.'

"See also Logan *vs.* Penn. R. R. Co. (132 Pa. St. 403, 410.)

"This court having no jurisdiction, the appeals must be dismissed, and it is so ordered."

It might be added that the Circuit Court in this Circuit has proceeded in the case of London Guarantee and Accident Co. *vs.* Doyle & Doak, Circuit Court of the U. S., Eastern District of Pennsylvania, April Term, 1904, to punish a man for contempt who failed to obey the order to produce, and that that case was appealed to your Honorable Court and the question of the right of the Circuit Court to so punish for contempt was certified to the United States Supreme Court, and the argument on that

case in the U. S. Supreme Court is likely to be held next month, to wit, November of 1906.

In Logan *vs.* the Pennsylvania Railroad, 132 Pa., 403, it was settled by the Supreme Court of the State of Pennsylvania, that an appeal from an order to produce books, under the Act of 1798 of the State of Pennsylvania (which Act is almost identical in language with Section 724 Revised Statutes) would not lie, and the appeal taken in that case was quashed on the ground that the order was interlocutory.

The effort of the counsel representing the plaintiffs in error in the case at bar, to prove that the entry of judgment in case of default is in the nature of an execution, certainly cannot command the approval of the court. The learned counsel for the plaintiffs in error contends that when the order is made that thereby a final and definite decree has been entered, from which an appeal can be taken, and that when judgment is entered in default it is really a sort or species of execution. It surely requires no argument to show the fallacy of this contention, because when the order is entered for production, if there is a failure to obey it, then the other side goes into court and asks judgment in default, and the statute says the court *may* enter judgment. There is nothing in the Act which says that the court *must* enter judgment in default, nor is there anything to show that all the questions as to the pertinency of the evidence and the propriety and scope of the order would not be fully considered by the court before judgment is actually entered, and when judgment is entered then it is the same as if the case had been heard on the merits and judgment entered, and in either case an appeal can be had, and when the case is brought up for review in your Honorable Court then you will review all that has been done in the case in the lower court. No rights are lost to the person against whom judgment has been entered in default, because nothing can happen to aggrieve him until the lower court does enter the judgment.

So much for the proposition of the plaintiffs in error

that the order to produce is a definite and final order from which an appeal or writ of error will lie.

TO RECAPITULATE BRIEFLY:—

First.—The order was made against the plaintiffs in error as officers and agents of the Pennsylvania Railroad, the defendant in the original suit, and not against them as individuals. The court called for none of the books or papers of the plaintiffs in error as individuals, but it did call for the books and papers of the Pennsylvania Railroad, the defendant in the original suit. The plaintiffs in error, by appealing as individuals and not as officers of the Pennsylvania Railroad, cannot change the character of the order which the court made against them. It might be said that the order sought to have been against the Pennsylvania Railroad and the plaintiffs in error as its officers, but if this criticism could be made, the time to make it is when the lower court attempts to enforce judgment in default, and the lower court might take the view that the order should be against the Pennsylvania Railroad as well as against the plaintiffs in error as its officers. We would be prepared to hold and argue that the order is substantially and in reality against the Pennsylvania Railroad through its officers and agents. But if the lower court held otherwise then it would not enter judgment by default, and neither the Pennsylvania Railroad nor its officers nor agents would be aggrieved, or at least so aggrieved from which any appeal could be taken, because no final judgment would be entered.

Second.—We believe that the right of action given by Section 8 is not penal in its character, notwithstanding the *dicta* that has been quoted from various cases, and that when the question is flatly presented to the higher courts they will hold that the action, so far as the Eighth Section of the Interstate Commerce Act, is concerned, is a civil right to compensatory damages, and not a penalty; and, it might be well to quote the Eighth Section in this connection:—

"That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

But over and above all this, this question cannot be examined and decided in the present state of the record, because the plaintiffs in error or the Pennsylvania Railroad, whoever is contending that the action is a penal action, must first get a final decision in the main or original case.

Third.—It is confidently asserted by the defendant in error that the later cases which decide that the production of books and papers may be ordered before the trial of the cause give a correct interpretation of Section 724 Revised Statutes. The language of the section is "In the trial of actions at law," &c., and the counsel for the plaintiffs in error contend that that means in the *actual* trial, but certainly this cannot be seriously considered to be a true construction of the said section. It means actions at law as distinguished from actions in equity, that Section 724 shall apply to, and when you read the decisions, no matter whether they decide that the papers and books should be produced before trial or only at the trial, they all agree that Section 724 was meant for a short cut for a bill of discovery and should be a side order in the main case. If the contention of the counsel for the plaintiffs in error is correct, there would have been no necessity for Section 724, because a subpœna *duces tecum* would have given the litigant all the rights which this Section 724 gives him, if

the said section means that the production of the books and papers cannot be compelled prior to the trial of the cause. The parties are very well protected by the discretion that is lodged in the lower court in making the order, and the evils would be greater by absolutely cutting a party off from an examination of the books and papers before trial, than to hold that the court had power to order the production of the books and papers before the trial had actually begun. We think the question of misuse of any evidence, and the scope of the order for examination, can be safely left to the wise direction of the judges of the Circuit Court.

Suppose the contention of the counsel for the plaintiffs in error would prevail, that the lower court could not order the production of the books and papers prior to the actual beginning of the trial of the cause in court, to wit, the taking of testimony after the jury had been sworn. How could a suitor who is prosecuting a carrier corporation defendant for secret rebates, secure any evidence or prepare for trial until he could examine the books and papers prior to the date set for trial? Such evidence is locked in the breast of the party offending, and it requires a section like 724 to open the channel, so that the plaintiff, the injured suitor, can secure his rights, and undoubtedly it was to cover this and kindred cases, that Section 724 was passed.

Fourth.—The car distribution orders which were required to be produced, undoubtedly contain relevant testimony. The said orders are the first steps in the discrimination of the distribution of coal cars, and we think that this question is so plain that it really requires no further discussion.

Fifth.—The order appealed from is not a definite or final order from which an appeal or writ of error will lie. The plain proposition of the defendant in error is as follows: There must be a final judgment, either in default for failure to produce books and papers, or a judgment after hearing upon the merits of the case, before an appeal will

lie. The plaintiffs in error had the order made upon them as officers and agents of the Pennsylvania Railroad Company, and if they failed to obey the order as such officers, judgment would be entered in default against the Pennsylvania Railroad Company, unless there was some defect in the order itself, in which case, of course, the Circuit Court would not enter judgment until that defect was remedied, as, for instance, if it was necessary that the Pennsylvania Railroad Company as well as the officers and agents should be named in the order to produce the books and papers.

The only other way that an appeal or writ of error could be taken by the plaintiffs in error would be if there was a separate case or controversy as to them. This could only arise in case the court had power to and had actually visited its punishment for disobedience to the order. If the court had not power to punish for disobedience of the order, on the ground that the only penalty contained in Section 724, then the court would be confined to the entry of judgment in default against the Pennsylvania Railroad Company, and nothing could be done with the plaintiffs in error if they refused to obey the decree or order to produce the books and papers. If the court had power to punish for contempt, then the plaintiffs in error must await the next step in the proceeding, to wit, the visiting of the punishment upon them for their disobedience to the order to produce.

It is plain to be seen that the right to writ of error or appeal has not arrived, because there has been no such final judgment, either as against the Pennsylvania Railroad Company or as against the plaintiffs in error, as to warrant an appeal or writ of error to this court.

Respectfully submitted,

BENJAMIN S. HARMON,
JOHN W. GRIGGS,
DAVID L. KREBS,
GEORGE S. GRAHAM.
Counsel for Defendant in Error.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES CIRCUIT.

No. . October Term, 1906.

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. S. Robertson, R. L. Head, Plaintiffs in Error,

vs.

Pennsylvania Coal and Coke Company, Defendant in Error.

MOTION TO QUASH WRIT OF ERROR.

The Pennsylvania Coal and Coke Company, Defendant in Error, by its counsel, respectfully moves the court to quash the appeal in the above stated cause for the following reasons:—

First.—Because the order entered on the 12th of April, 1906, on the defendant, its officers, agents and employees, to produce the distribution sheets and papers therein mentioned, is an interlocutory order and not the subject of an appeal.

Second.—Because the appeal is irregular, not warranted in law and premature.

Third.—Because no error was committed by the Circuit Court in awarding the order on Plaintiff's petition.

Fourth.—Because the order entered applied to and affected the plaintiffs in error as officers and employees of the Pennsylvania Railroad Company, defendant, and not in their personal or individual capacity.

BENJAMIN S. HARMON,
HON. JOHN W. GRIGGS,
DAVID L. KREBS,
GEORGE S. GRAHAM,
Attorneys for Defendant in Error.

Office Supreme Court, U. S.
FILED.
OCT 23 1907
JAMES H. McKENNEY,
CLERK.

No. 283. October Term, 1907.

IN THE

Supreme Court of the United States

Webster Coal and Coke Company, Petitioner,

vs.

A. J. Cassatt, John B. Thayer, Charles E. Pugh, *et al.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF DEFENDANTS.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Defendants.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1907. No. 283.

Webster Coal and Coke Company, Petitioner,

vs.

A. J. Cassatt, John B. Thayer, Charles E. Pugh, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF DEFENDANTS.

ARGUMENT.

The order of the Circuit Court it is claimed was justified by Section 724 of the Revised Statutes, which provides as follows:—

> "In the trial of actions at law, the courts of the United States may, on motion and due notice

thereof, require the parties to produce books of writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him in default."

It is submitted that this section did not justify the order in question, for the following reasons:—

1. The order is directed to and against individuals who were not parties to the cause, while the power conferred by the section is to "require the parties to produce, &c."

2. The order directed the production of books and papers for the inspection of the petitioner prior to the trial of the cause, while the section empowers the court to order production at the trial only.

3. The order directed the production of papers the possession of which either by the persons against whom the order issued or by the defendant in the action had not been established or shown.

4. Under the express terms of such section orders can be made thereunder for production of books and papers only "in cases and under circumstances where they (i. e., **the parties) might be compelled to produce the same by the ordinary rules of proceeding in chancery." The order made infringes this limitation in two respects.**

(a.) **The production of the papers embraced in the order was directed in order to assist the petitioner in establishing a case of discrimination forbidden by the Inter-**

state Commerce Act which if established would justify criminal proceedings against the defendants. Under such circumstances their production could not have been compelled by any proceeding in equity and consequently an order under Section 724 was not justified.

(b.) **If the defendant could be required to produce its papers at all, in view of the purpose for which their production was sought, the petitioner by the express terms of the Interstate Commerce Act could enforce their production by and through a *subpoena duces tecum*, and having this method available could not have resorted to proceedings in equity and consequently cannot avail itself of the provisions of Section 724.**

•

Before, however, considering the objections to the validity of the order, the right of the Circuit Court of Appeals, and consequently of this Court, to consider and pass upon its validity and regularity should be considered, for if the contention urged by the petitioner in the Court of Appeals and repeated in this Court should prevail and it should be held that the order made by the Circuit Court was not a final one to which a writ of error would lie, then necessarily it would seem to follow that all that the Court of Appeals could have done would have been to dismiss or quash the writ of error upon the ground that it had not jurisdiction to hear and determine the case, and the action of this Court we assume would have to be restricted to a reversal of the order made by the Court of Appeals solely upon the ground that that Court had no jurisdiction to pass upon the questions raised by the appeal. Consequently if the conclusion of this Court should be that the order of the Circuit Court was not a final one justifying an appeal, we assume that it would consider that it was relieved from the necessity of considering the question of the validity of the order of the Circuit Court on its merits, and any discussion of the matters affecting the validity of the order would therefore be unnecessary.

The order of the Circuit Court was, however, we submit a final one and one consequently which the Court of Appeals was justified in reviewing.

The courts have uniformly regarded the procedure authorized by Section 724 of the Revised Statutes as a substitute for proceedings in equity in the nature of discovery.

We do not suppose that even our adversaries will contend that if the petitioner had been at liberty to proceed in equity by a bill of discovery and had obtained an order or decree similar to that which it has obtained under Section 724, an appeal from such order or decree would not have been allowable. In such a case the defendant undoubtedly could have appealed and would not have been relegated to an appeal from any decree which might be entered against him in the action for the furtherance of which the discovery had been sought and obtained. This proposition we do not believe will or can be seriously disputed.

But if the order now before the court would have been a final one in an equity proceeding of the character alluded to, upon what theory can it be claimed that it is not a final one under the procedure authorized by Section 724 of the Revised Statutes? The question of its finality it would seem ought not to be determined with reference to the character of the proceeding in which it was made, but should be determined solely with reference to the question whether the Court has finally by its order or decree disposed of the controversy with respect to which the order was made.

Unquestionably the order before the court was a final one, in the sense that it exhausted the power of the court in the proceeding in which it had been made. Even failure, on the part of the defendants, to comply with its directions, would not open the door to further proceedings or orders, for such failure would not subject them to any pains or penalties whatsoever. The penalty of such disobedience would be visited upon the defendant

in the main action, for by the provisions of Section 724 failure to produce books and papers by a defendant when ordered authorizes "entry of judgment against the defendant by default" and this is the only penalty that follows such failure.

> "Whenever in a cause there is a determination of some question of right, a decision is final, in the sense in which an appeal from it is permitted, if it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the court, so that to bring the cause again before the court for decision will not be necessary. Mackeye *vs.* Mallory (decided by this court February 23d, 1897), 24 C. C. A., 420, 79 Fed., 1; Rouse *vs.* Hornsby, 14 C. C. A., 377, 67 Fed., 219; Gumbel *vs.* Pitkin, 113 U. S., 545, 5 Sup. Ct., 616; Central Trust Co. *vs.* Grant Locomotive Works, 135 U. S., 207, 10 Sup. Ct., 736."

Wallace, Circuit Judge, in Butler *vs.* Fayerweather, 91 Federal Reporter, page 458.

Tested by this definition, the order involved in the present proceeding was certainly final, for beyond all controversy it did finally and completely dispose of the question of the right of the petitioner to have the defendant's papers submitted to its inspection in advance of trial and left open no question or matter for further consideration or action by the court and it was final, therefore, both as to the defendant and those to whom it was directed.

But it will doubtless be argued that the present case is ruled by the decision of this court in the case of Alexander *vs.* United States, 201 U. S. Reports, page 117. The two cases, however, are clearly distinguishable.

In that case it appeared that a suit was pending in a Circuit Court of the United States under the Anti-Trust Act, in which testimony was being taken before an examiner.

The Circuit Court made an order requiring a witness to answer certain questions and to produce certain books before such examiner, and from this order the witness appealed. This court dismissed the appeal holding that the order was not a final one. The decision was rested upon the proposition that an order made upon a witness to answer questions or produce documents, either upon the trial of the cause or before an examiner, was not an order made in any case or controversy between the witness and the party at whose instance it had been entered, but was merely an interlocutory order in the main cause.

Mr. Justice McKenna, who delivered the opinion of the court, adopted as a correct statement of the law upon the subject the following extract from an opinion of Circuit Judge Van Deventer, rendered in a case in which that Judge had been called upon to deal with a somewhat similar question:—

> "I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the government, as a sovereign, vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witness in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

It will be observed that this opinion concedes that when a final order is made against a witness in any proceeding which can be regarded as a suit or controversy, to which he is a party, the right to appeal arises.

This indeed had been determined by the previous decisions of this court in the cases of Interstate Commerce Commission *vs.* Brimson, 154 U. S., 447, and Interstate Commerce Commission *vs.* Baird, 194 U. S., 25.

In both these cases the question involved related to the right of a Circuit Court to compel answers and production of documents by witnesses, and in both this court considered and acted upon appeals which had been taken from the orders made, and had consequently dealt with these orders, not as interlocutory in the proceedings in which the testimony was sought, but as final in the separate proceedings against the witnesses. "Those cases," says Mr. Justice McKenna, referring to the Brimson and Baird cases, "rested upon statutory provisions which do not apply to the proceedings at bar, and while there may be a resemblance to the latter there are also differences."

What we understand the learned justice meant by this was, that the orders in the Brimson and Baird cases were made in proceedings against the witnesses which were distinctly substantive proceedings of themselves, and were not merely orders made upon a witness called to testify in the main proceeding, for the court will observe that Mr. Justice McKenna saw no distinction between the case of a witness called to testify upon a trial and that of the witness called to testify before an examiner. "Why," he says, "should greater rights be given a witness to justify his controversy when summoned before an examiner than one summoned before a court? Testimony at times must be taken out of court."

The effect of the decision in the Alexander case, taken in connection with the decisions in the Brimson and Baird cases, may, we submit, be thus summarized:—

That when an order upon a witness to answer questions or produce documents is made in a proceeding against the witness, which amounts to a case or controversy within the generally accepted meaning of those terms, an appeal from such order will be sustained if the order is a final one; that where, however, the order upon the

witness is made when he is upon the stand or before an examiner, such order cannot be appealed from because no case or controversy, to which the witness is a party, has arisen, but an appeal will lie at the instance of the witness when an order punishing him for refusing to answer or produce the documents has been made, because then an order has been made in a case or controversy to which the witness is a party.

It is confidently submitted that the present is within the first above mentioned class of cases, and that, consequently, the appeal to the Circuit Court of Appeals was properly taken, and that that court acquired jurisdiction of the case.

Bearing in mind that the question at issue in the proceeding in which the order was made was the right of the petitioner to inspect in advance of trial the defendant's papers, it will at once be perceived that if the defendant can only have this question reviewed upon the appeal from the judgment in the main action, it will necessarily be deprived of any effective appeal, for in the meantime its right to an exemption of its papers from inspection by its adversary will have been lost and the appeal, therefore, would accomplish nothing, for the wrong would already have been done if the petitioner had no right to the inspection which the order granted.

But it is not perceived how on such appeal any question could be raised as to the validity of the order for inspection.

Assume that in the present case, an appeal not being allowable, the papers had been submitted to inspection of the petitioner. Having secured all the information desired the petitioner at the trial obtains the papers through a *subpœna duces tecum* and the trial is conducted without any reference to the order for inspection or the inspection itself. If the trial should terminate in a judgment for the defendant, manifestly no review of the validity of the order of inspection could be secured. And would not the same be true if the judgment should be in the plaintiff's favor. This judgment would have

been obtained solely upon the evidence adduced at the trial and how could it be successfully attacked because of something that had transpired prior to the trial which so far as the Record went had had no effect whatever upon the result.

If the judgment could be reversed because of the error committed in requiring the defendant to submit its papers for inspection, the error would equally affect any subsequent trial, for the information wrongfully obtained through the means of an inspection not authorized would operate to the disadvantage of the party whose papers had been inspected in any and all trials that might thereafter take place.

But it may be said that the argument goes too far, and that it will apply equally to papers produced and given in evidence at the trial either under an order made under Section 724 or under the ordinary process of a *subpœna duces tecum*. The answer, however, to this is that theoretically, and, indeed, as a matter of fact, a party who is compelled at a trial to produce his papers does have a right to have reviewed on appeal from any order made in the course of the trial compelling such production.

It would, however, involve an unwarranted and intolerable interference with the trial of causes, if the trial had to be suspended until this appeal could be heard and determined, and *ex necessitate*, therefore, its hearing is deferred until the termination of the trial.

Where, however, the orderly administration of justice does not require that the hearing of an appeal should be thus deferred, there would seem to be no reason why the hearing should be postponed to the detriment of the party affected by the order.

Assuming, then, that the order of the Circuit Court was a final one, and that, consequently, this Court is at liberty to consider and pass upon the validity of the same, the questions affecting its validity and regularity

remain for consideration, and these will be taken up in the order in which they are stated at the head of this brief.

I. The order is directed to and against individuals not parties to the cause.

Under Section 724 of the Revised Statutes, the court is only authorized to require *the parties* to produce books or writings in their possession or power. The defendants were not parties to the action, and therefore the court had no power to enter such an order against them.

Indeed not only were they not parties but there is no evidence that any one of them was an officer or agent of the defendant. The order itself refers to them as such, but there is no evidence to support this: not even an averment to that effect in the petition upon which the order was made. In the order many of them are simply designated as "agents and employees of the Pennsylvania Railroad Company," and it nowhere appears that the papers embraced in the order are in the custody of any of them.

The Record also discloses that the order was made without any notice to them. They were not made parties to the proceeding in which the order was made and were not parties to the main action. The petition upon which the order was made did not even aver or allege that the papers desired were in their custody or control. The allegation made therein in respect to some of the papers, viz., the daily car distribution sheets simply was to quote therefrom "That said daily distribution sheets are in the custody and under the exclusive control of the defendant company." There is no averment that the other papers called for were in the custody of the corporation defendant or of any of the defendants.

So that we thus have an order made against a large number of individuals, none of whom are shown to have

any connection with the defendant in the action who may be perfectly unable for aught that appears to produce the papers called for. Even if it had appeared that they stood in some relation to the defendant they were not afforded the slightest opportunity to show cause why an order should not be made against them. Even if it were permissible to assume or infer that they were in some way connected with the company, it is inconceivable that they all—and the order went out against seventeen—had such control over the papers sought as to warrant an order against them for the production of the same.

It is clear, therefore, we submit, that the order was invalid because directed against persons concededly not parties to the cause and who had never had an opportunity afforded to them to show cause against its issuance.

But even if it had appeared that the defendants were officers and agents of the defendant in the action and in charge of the papers sought, an order against them was not warranted by the section under consideration.

That the section is a highly penal one cannot well be denied. By its terms judgment goes against the party who fails to comply with any order made pursuant to it.

The terms of the Section, therefore, should be strictly followed and adhered to, and orders made against parties to causes and no others, otherwise the record would fail to sustain the judgment, for it is inconceivable that judgment could properly go against a party to a cause upon proof that an agent or employee of his had failed to comply with an order to produce papers made under the section in question.

Will the court assume that a party to a cause can compel an agent or employee to obey an order made under this section and therefore conclusively presume that any failure of the agent or employee to obey the order must be ascribed to and treated as disobedience of the party himself.

It is monstrous to assume that the severe penalty of

judgment by default may be entered against a defendant by reason of the failure of his bookkeeper to comply with an order directed not to the defendant but to his bookkeeper. Yet that is what the practice sanctioned by the order of the court below would permit.

The illegality of such an order when directed to an agent of a party to the cause has been established in the State of Pennsylvania by a decision of the Supreme Court of that State construing a statute very like Section 724 of the Revised Statutes. The Pennsylvania Statute provides as follows:

"The Supreme Court, and several courts of common pleas in this state, shall have power, in any action pending before them, on motion, and upon good and sufficient cause shown, by affidavit or affirmation, and due notice thereof being given, to require the parties, or either of them, to produce books or writing in their possession or power, which contain evidence pertinent to the issue; and if either party shall fail to comply with such order, and to produce such books or writings, or to satisfy said courts why the same is not in the party's power so to do, it shall be lawful for the said courts, if the party so refusing shall be a plaintiff, to give judgment for the defendant as in cases of non-suit, and if a defendant to give judgment against him or her by default, as far as relates to such parts of the Plaintiff's or Plaintiffs' demand, or the Defendant's or Defendants' defence, to which the books or papers of the party is alleged to apply."

In Rose *vs.* King, 5 S. & R. 241, the lower court (under the provisions of this Act) had made an order upon an agent of the plaintiff for the production of certain papers at the trial of the cause. Upon a non-compliance with the order, the penalty prescribed by the Act, viz., a non-suit had been entered which was reversed by the Supreme Court of Pennsylvania on the ground that under the Act the order was defective if directed to a third person, even though he be an agent of a party to the record. Mr. Justice Gibson, delivering the opinion of the court said:—

"The affidavit is also defective, in not alleging that the deed was in possession of the plaintiffs. It was seen in the possession of Seely Huling, who was an agent of the plaintiffs; but whether as an agent or as the owner of it, and if the former, whether it remained in his possession at the time of its application, does not appear. If it were Seely Huling's own, or not entrusted to his care by the plaintiffs' it would not be peculiarly in their power; and, of course its production could not be enforced under the Act; but the party wishing to use it, would have to resort to the usual means of a subpœna with a *duces tecum*. The notice was served also at a period altogether too late, being only three days previously to the granting of the rule; and the rule itself was wrong, being made not only during the trial, but personally on Seely Huling, who was at most but an agent; it should have been on the plaintiffs in the cause. *A Court has no right to designate a third person, not marked as such on the record, as the real party, and proceed against him: It is the plaintiff of record who is to be nonsuited, and the rule must be against him.* It was unnecessary to treat Seely Huling as the party; if he were in fact so, the production of the paper might have been procured by a rule on the plaintiffs of record, which would have given the defendants all the benefit they were entitled to in any shape. If the paper came to his possession as an agent, it was to be considered in the power of the plaintiffs for all purposes beneficial to the defendants, in a proceeding on the act; if it were his own, he would, even though substantially interested, be bound to produce it on a subpœna."

Probably it will not be contended that in the case of an individual the order could go out against any other than the party himself, but it will doubtless be claimed that a different rule should prevail as to a corporation.

But upon what theory can a distinction be made between the two? If the order should go against the custodian of the paper to be produced there is no reason why it should go against the custodian of a corporation's papers but not against a custodian of an individual's or

of a firm's. If the custodian is the individual to be affected by the order what difference does it make whether his principal is a corporation or an individual?

The claim advanced in the court below was that the order was properly issued against defendants because of the rule that exists under which officers of a corporation are made parties to a bill of discovery directed against the corporation itself.

But the reason for this exception to the ordinary rule that a bill of discovery only lies against a party to a cause has no application to a proceeding under Section 724. When a corporation is called upon to make discovery it must do so under oath and as it can only answer under seal the practice was established of requiring answers from its officers and consequently of making them parties to the bill itself.

But this cannot possibly sustain or justify the procedure under Section 724 which was followed in the present case, for there is no reason at all why the order which it provides for should not go out against the corporation, and this especially is true when it is considered that failure to obey the order does not justify any proceeding for disobedience—so that nothing could be gained by having the individual amenable to the pains and penalties consequent upon disobedience—the only consequence thereof being a judgment against the party to the cause.

There cannot be any doubt therefore, we submit, that an order of this character directed against employees of a party to the cause and not against such party itself is not authorized by Section 724 or any other provision of the Revised Statutes, and this was the view of the Circuit Court of Appeals. (Record, page 31.)

The order was invalid because it directed the production of the papers referred to therein and the submission of the same to the inspection of the petitioner before the trial.

The power conferred by the section is exercisable "*in the trial* of actions at law." If it had been the intention to confer power to compel production in advance of trial why say "in the trial of actions"? "In actions at law the courts of the United States may," &c., would have been the natural way of conferring the power if it was to be exercised to the extent claimed by petitioner.

The insertion of the words "in the trial of" indicates very clearly that the power conferred was not to be exercisable at any other stage of the action, and the whole procedure contemplated by the section is consistent with this theory of the extent of the power conferred by it.

The order authorized is simply to produce—which naturally means at the trial,—not to submit to inspection of the opposite party. If the production is to be at the trial the court can then deal with the papers produced as it would with books and papers produced under a *subpœna duces tecum*. No further grant of power therefore is necessary to make the production effective. But in the case of production before trial, the mere act of production accomplishes nothing unless the court exercises a power not conferred by the section and couples with the order to produce an order to submit the papers to the inspection of the party desiring their production.

The books and writings to be produced are those "which contain evidence pertinent to the issue," thus clearly indicating that they are to be produced in order that they or their contents may be given in evidence. If orders for inspection of papers in advance of trial were contemplated the section would not have thus defined the papers covered by it. The definition would have been enlarged so as to include papers in the possession of one party which his adversary was under the chancery procedure entitled to inspect.

Again the procedure which the section authorizes in the event of a failure or refusal to comply with the order naturally adapts itself to proceedings had at the trial; the penalty is a judgment in favor of the party obtaining the order to be entered on motion. "If a plain-

tiff fails to comply with such order the court may on motion give the like judgment," &c., is the language of the section.

If this judgment is to follow a failure to produce for inspection before trial, surely some procedure would have been provided for designed to inform the court as to what had transpired. Suppose a case in which a conflict should arise as to whether the order had been obeyed, what method does the section provide or even contemplate for the determination of the same?

No doubt it is possible to construct theories and to import into the section by implication powers not specifically confirmed, which would be sufficient to justify orders under the section for inspection in advance of trial, but we submit that if the language of the section is considered solely with the desire and purpose of ascertaining what power its framers intended to confer, the only conclusion that can fairly be reached is that for which we are contending, viz., that "in the trial of actions at law" means "in the trial" and not "before the trial."

It is undoubtedly true that a number of the Circuit Courts have construed the section under consideration as warranting orders for inspection before trial while others have given it the more limited and, as we believe, correct interpretation.

But in no case in which this point has been at issue has the question received the thoughtful and thorough consideration which it received at the hands of the Circuit Court of Appeals in the present case, and the opinion of that court so conclusively establishes the correctness of the decision to which it came that we do not feel warranted in attempting to add anything to what has been so well said. That part of the opinion which deals with this point commences at the foot of page 31 of the Record and extends to the bottom of page 37.

We have already referred to the statute of Pennsylvania giving the power to compel production of books and papers.

That statute empowers the courts "in any action pending before them"—not "in the trial of any action" to direct a party to the cause "to produce books or writings in their possession and power which contain evidence pertinent to the issue," but the courts of that State have uniformly held that power to require production and inspection before trial has not been conferred upon them by this statute.

The reason for this restriction of the Act is thus stated in Thomas *vs.* Smith, 1 Troubat & Healy's Practice, Sect. 610. "The Act of February 25, 1798, is a highly penal statute, and although in terms it does not confine the rule to produce books and papers to the trial of the cause, yet the uniform practice under the act has so confined it. To extend it further would be accompanied with great danger and inconvenience. The right to inspect books and papers before the trial has therefore been confined to the cases where the parties have a common interest in the instrument of evidence called for. Where books and papers are produced before the court and jury, in a public court, there is an evident restraint upon making an improper use of them. Were we to establish the precedent asked for, every defendant who was willing to pay the plaintiff's demand, would resort to this move for the purpose of fishing up a defense or attack upon the plaintiff, from his books and papers * * *."

This statement of the law was adopted by the Supreme Court of the state in Raub *vs.* Van Horn, 133 Pa. St., 573.

The next objection to the order is that it directed the production of papers the possession of which by the plaintiffs in error or by the defendant in the action had not been established.

It will doubtless be conceded that the party seeking the order must show possession or control by his adversary of the papers sought.

In the present case the petitioner on April 6th, 1906, gave notice in writing of its intention to apply on April 11th, 1906, for the order which it subsequently obtained.

On page 17 of the Record will be found the acknowledgment by counsel for the defendant in the action of receipt of this notice which specifically reserved all rights of objection and especially that based upon insufficient notice.

It will be seen that the defendant was thus given five days in which to answer as to its possession of a great mass of papers included in which were certain so-called distribution sheets showing the distribution of cars made by the defendant among the shippers of coal located on its lines for the whole period of the action—a period of almost two years.

In the time available it was not practicable to ascertain whether every one of these sheets was still extant and available and this fact was set up in the answer to the petition for their production as will appear by reference to this answer which will be found at page 18 of the Record. After setting up other objections to the order prayed for the answer continued:

> "Subject to and without waiving the objections above stated to the granting of the order sought by the plaintiffs, this defendant further states and shows to the court that it is unable at the present time to answer as to its ability to produce the distribution sheets referred to in the plaintiff's petition for the entire period of time referred to therein. It has in its possession a large number of such sheets but until a more thorough examination is made than it has been able to make as yet in order to determine what sheets it has it cannot answer definitely as to this."

That the defendant was amply justified in declining to admit, pending a thorough examination, its possession of every one of the sheets called for must we submit be conceded in view of the penalty to which it would be subjected if it had admitted the possession of all the sheets, and then had been unable to produce one

or two of them. Its failure to produce one might have been followed by the entry of judgment against it under the provisions of the section.

Notwithstanding this averment of the answer the court on April 12th entered the order sought. In so doing we submit a most substantial and important right of the defendant was ignored, viz., the right to have no order made for the production of papers until at least it had had sufficient opportunity to ascertain whether it had them in its possession and consequently could produce them.

The order finally was not warranted because production of the papers was sought in order to assist in the establishment of discrimination forbidden by the Interstate Commerce act, in respect to which, if established, the defendant would have been subject to indictment, and because the plaintiff, if entitled to the papers at all, could have secured their production by and through a *subpœna duces tecum.*

The plaintiff's asserted right of action was based upon alleged acts of discrimination on the part of the defendant in violation of the Interstate Commerce Act. Under the tenth section of the act this alleged discrimination, if established, would have amounted to a misdemeanor not only on the part of the defendant, but as well on the part of any of its officers who participated in the acts constituting the discrimination.

If, therefore, the papers covered by the order, if produced, would establish facts tending to support the plaintiff's allegations, the enforcement of the order would unquestionably compel the defendant and its officers to themselves produce papers for the purpose of establishing the existence of an act or acts which would render them liable to indictment and fine.

The question, therefore, to be considered is whether Section 724 justifies an order for the production of papers under such circumstances.

We do not set up or claim that the order was invalid because it violated or ignored any immunity secured to either the corporation defendant or its officers under or by virtue of any provisions of the Constitution of the United States.

Our point is simply that Section 724 of the Revised Statutes does not authorize courts to order the production of papers under circumstances such as we have referred to.

It is not our contention that Congress *could* not have required the production of papers under these circumstances, for it is not necessary to consider this proposition; our contention is that it *has* not so legislated.

Section 724 does not provide that the courts shall have power to order the production of all papers, the production of which can be compelled or enforced; the authority which it confers is limited to orders for the production of papers "in cases and under circumstances" where their production could be compelled "by the ordinary rules of proceeding in chancery."

Our position may be thus summarized:—

The plaintiff in its pending action is seeking to recover damages because of alleged discrimination practiced by the defendant and forbidden by the Interstate Commerce Act.

This discrimination, if established, would subject the defendant and its officers, parties thereto, to indictment and fine.

Equity would not compel discovery of books and papers by a defendant under such circumstances.

Section 724 authorizes orders for the production of books and papers only in those cases in which a Court of Equity would make a similar order.

Unless the above statements can be controverted it inevitably follows, we submit, that the order of the Circuit Court was improperly made because not warranted by the provisions of Section 724.

The petitioner we understand contends that the above deduction as to the invalidity of the order is not justified because it claims, if we correctly understand its position,

(a) that the establishment of the discrimination alleged would not have subjected the defendant and its officers to indictment and (b) that by reason of certain circumstances, which will be presently alluded to, a Court of Equity would have been justified in making an order similar to that made by the Circuit Court, and consequently that Court was justified in making this order under the provisions of Section 724.

The petitioner's suggestion that the establishment of a case of discrimination would not subject the defendant and its officers to indictment is rested upon the proposition that because of the time which will elapse before a final determination is reached in the main action the Statute of Limitations would bar any prosecution before this period is reached.

Just why it should be assumed that any prosecution would be deferred until the determination of the action is not clear. The order as made required the production of the defendant's papers on the 12th day of April, 1906, and it is not asserted that on that date and immediately thereafter a prosecution could not have been instituted because of the time that had elapsed from the date of the transactions to which the papers related. The order, therefore, did require the defendant and its officers to produce books and papers for the inspection of the petitioner, the right to inspect which had been secured because of allegations that these when produced would tend to establish the acts of discrimination alleged, at a time when a prosecution was not barred, and thus required the defendant to furnish evidence in support of acts which it was claimed amounted to a misdemeanor, thus rendering it liable to indictment and fine.

The petitioner's contention in support of the proposition that a Court of Equity would have made a similar order to that made by the Circuit Court is rested upon the proposition that under certain provisions of the Statutes of the United States the defendant would have been protected from any criminal proceedings based upon facts ascertained or disclosed by reason of the submission by it of its papers to the inspection of

the plaintiff and its agents pursuant to the order of the Circuit Court, and that this fact would have led a Court of Equity to make the order which otherwise it would not have made.

The first of these statutes referred to is the so-called Elkins Act, approved February 19, 1903. This act provides that in proceedings under the Interstate Commerce Act the Courts shall have power to compel the production of books and papers, and then grants immunity to any corporation which shall produce its books and papers in respect to any matter concerning which documentary evidence may have been produced.

The provisions of this act have reference solely to the production of books and papers upon the trial of causes. There is not a word in the act to indicate that it was intended to accomplish any other purpose. And the immunity granted extends only to transactions, matters or things concerning which the corporation may "*produce evidence documentary or otherwise.*" The immunity, therefore, as expressed, is only in respect to transactions, matters or things concerning which documentary evidence is produced.

The order in the present case does not direct the production of "documentary evidence;" it required the defendant to submit to the inspection of the plaintiff certain of its papers which may never themselves be offered in evidence in any case or proceeding.

Suppose the defendant had produced for the petitioner's inspection the papers embraced in the order and that it appeared from these that the defendant had been guilty of a violation of the Interstate Commerce Act, and an indictment followed. Could the defendant possibly set up the provisions of the Elkins Act just alluded to as barring the prosecution? Clearly not for the papers themselves would not have been given in evidence in any case and would not, therefore, have become documentary evidence within the meaning of that term as used in the Elkins Act.

What we have already said applies equally to the Act

of February 25, 1903, which the petitioner also refers to as affording immunity as against any prosecution resulting from the submission by the defendant of its books to the inspection of the plaintiff.

Section 860 of the Revised Statutes is also cited upon by the petitioner.

This Section provides that "No pleading of a party nor any discovery of evidence obtained from a party or witness * * * shall be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture."

The petitioner concedes that under the decision of this Court in Counselman *v.* Hitchcock, 142 U. S. 547, this section does not afford the complete immunity to which a party is entitled before he can be compelled either to be a witness against himself or to produce books and papers which will tend to criminate him.

The reasons given by this Court for reaching the conclusion at which it arrived in that case apply very strongly to the present case.

After referring to the extent of the immunity afforded by the Section, this Court, speaking by Mr. Justice Blatchford, said:

> "This of course protected him against the use of his testimony against him or his property in any prosecution against him or his property in any criminal proceeding in a court of the United States. But it had only that effect. It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

This reasoning applies quite as strongly to a case in which a defendant is required to submit his or its papers to inspection as to the particular case with which the court was dealing.

It will be observed moreover that Section 860 deals only with a "pleading of a party" and "discovery of evidence obtained from a party or a witness."

The present case, of course, has no relation to a pleading of a party, and we submit that the submission by the defendant of its books and papers to inspection would not have constituted a "discovery of evidence," for as we have already pointed out the papers themselves are not given in evidence at the time of their production for the purpose of inspection and hence the facts elicited from them have not been secured or drawn out through any "discovery of evidence."

We have thus dealt with the various matters set up by the petitioner as a reason why the Circuit Court was justified in ignoring the usual rule that a Court of Equity will not decree discovery of facts, the knowledge of which may tend to subject the person making discovery to criminal prosecution.

The rule itself is of course well settled and is thus stated in Bispham's Principles of Equity at Section 562:

> "A defendant need not answer matters which tend to criminate himself or expose him to a penalty or forfeiture, whether the matter inquired of be the broad and simple fact of crime or penalty or whether it be simply an incidental fact which may form a link in the chain of evidence if anyone chooses to indict him."
>
> See also Story on Equity Jurisprudence, Section 1494;
> Story's Equity Pleading, Section 553.

The rule to which we have just referred has been uniformly regarded by the Circuit Courts as controlling proceedings under Section 724. In Newbold *v.* American Novelty Company, 108 Fed. 341, it was determined that

in a *qui tam* action to recover the penalty prescribed by Section 4901 of the Revised Statutes for falsely marking an article as patented, the defendant could not be compelled, under Section 724, to produce books or papers containing evidence against him either for use in evidence at the trial or for inspection of the plaintiff before the trial.

Said BROWN, District Judge:—

> "The provision of Section 724 above quoted, expressly limits its application to cases and circumstances where the parties "might be compelled to produce the books and papers by the ordinary rules of proceeding in chancery." But no such production as here sought would be required by the ordinary rules of proceeding in chancery for use in an action for penalties like the present. "It is a universal rule in equity," says Story, J., "never to enforce either a penalty or a forfeiture; and a bill of discovery will not lie in a case which involves a penalty or a forfeiture."

In Finch *vs.* Rikeman, 2 Blatch., 301, in an action brought to recover damages for the infringement of a patent the court refused to made an order under Section 724 on the defendant to produce his books and papers, as the effect of the evidence would be to subject the defendant (under Section 14, of the Act of July 4, 1836) to a penalty of three times the amount of the damages suffered by the plaintiff. Betts, J., said:—

> "This motion demands the production of defendants' books, to establish the quantity and value of the manufactures of machinery made by the defendants, which manufacture is charged in the declaration to be an infringement of the plaintiff's patent. The effect of the evidence sought for will be not only to enable the plaintiff to recover his entire damages, but its direct consequence will be to subject the defendants to a penalty of three times the amount of those damages, under

Sec. 14 of the Act of July 4th, 1836, (5 U. S. Stat. at Large, 123). We think it against the rules of Equity, to allow a bill of discovery in such a case, unless the bill relinquishes all claim to the penalty which may be superinduced by the production and exhibition of the books, and, for that cause, the motion must be denied."

In U. S. *vs.* National Lead Co., 75 Fed., 94, in an action brought by the United States to recover back certain drawbacks paid the defendant upon certain imports of raw material upon the allegation that the manufactured article had been exported, which allegation it was claimed was false, a petition having been filed under Section 724 asking for the production of books and papers prior to trial, the court held that as the documents, if produced would tend to show the commission of a crime by the defendants, no order for production should be made, Green, J., saying:—

"But there is a more serious objection to the granting of this motion, and which is radical in its nature. Although the pending suit is, in terms, simply one to recover money had and received by the defendant to and for the use of the plaintiff, yet it is evident that the real gravamen of the action is the alleged fraud and misfeasance of the officers, agents, and servants of the defendant corporation, committed by them, or some of them, in the name and for the benefit of the corporation, in the making and presenting of false, deceitful, and fraudulent claims for drawbacks or rebates of duties on imported lead ore, and thus unlawfully obtaining the very large amounts of money involved in this suit. To obtain such rebates or drawbacks, the statute requires the claim to be verified by oath. This was done in the claim made by the defendant. If, therefore, the allegations of plaintiff are true, the officers and agents of the defendant corporation who were guilty of mak-

ing these fraudulent claims have laid themselves open to criminal prosecution, and the corporation itself has become liable to the penalties and forfeitures affixed to such acts by the statute. Now, the plaintiff alleges that the evidence of these unlawful acts is to be found in the books of the defendant, and for that very reason asks for the order requiring their production. But because of that very reason the order asked for ought not to be granted. It is not necessary to base the refusal to grant the order, under these circumstances, upon the protective clauses of the Constitution of the United States. Just, and in fact peremptory, reasons for such refusal are to be found clearly written in the statute, which confers upon the court the power sought to be invoked. Such power is, by the words of the statute, to be exercised only under circumstances where the parties might be compelled to produce the books and writings "by the ordinary rules of proceedings in chancery;" in other words, the order asked for is to be made only where circumstances would justify a discovery in proceedings in equity. This limitation upon the exercise of this power to require the production of books and writings absolutely bars the granting of the present motion, for it is a cardinal rule of chancery that a discovery will never be decreed when it might tend to convict the party of a crime or work a forfeiture of his property. Nor is this rule confined to cases in which discovery must necessarily subject the defendant to pain and penalties, but it is broadly extended to cases where it may do so. The discovery sought may, indeed, have no immediate tendency to criminate the defendant, but that does not militate against the enforcement of the rule that the defendant is not bound to accuse himself of crime, or to furnish any evidence whatever which shall lead to any accusation of that nature. I Daniell, Ch. Prac. 563; March *vs.* Marsh, 16 N. J. Eq. 391. As

was tersely said by Mr. Justice Bradley in Boyd *vs.* U. S. 116 U. S., 616, 6 Sup. Ct. 524, in commenting upon this statute:

"'Compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.'

"Hence it is clear that this statute, instead of authorizing the order asked for by the plaintiff, requires its denial. Equity has placed its veto upon such applications when made under circumstances which characterize this case, and, if equity would refuse to decree discovery, this court is powerless to order it to be made."

The further objection remains for consideration that the production of the defendant's books and papers at the trial can be enforced through and by a *subpœna duces tecum*, and hence a Court of Equity would not have entertained a bill designed to compel the defendant to make discovery of the contents of such books and papers and consequently a proceeding under Section 724 having the same end in view is not warranted.

It is well settled, we submit, that a bill for discovery in aid of an action at law cannot be maintained where the facts sought may be secured by an examination of the adverse party as a witness in the action itself.

The rule to this effect was acted upon by this Court in the case of Brown *v.* Swann, 10 Peters, 497. In that case this Court had to consider the sufficiency of a bill, to which a demurrer had been filed, which sought under a procedure authorized by a statute of Virginia to compel a lender of money to disclose what interest he had received in order that the borrower might be

relieved from the payment of anything more than the lawful rate of interest.

The following extract from the opinion delivered by Mr. Justice Wayne clearly indicates the view adopted and acted upon by the Court:

> "When the Legislature of Virginia passed the statute, it fixed the nature and extent of the jurisdiction of a court of equity to compel a discovery, upon oath, from an interested party, in a suit either at law or in equity, and the rules which equity had prescribed to itself to enforce its jurisdiction in this regard. It knew the distinction between a bill for such discovery and other bills in chancery; which are also bills for discovery. One of the former is a bill for the discovery of facts alleged to exist only in the knowledge of a person, a party to a private transaction with the person seeking the disclosure; essential to the establishment of a just right in the latter, and which would be defeated without such disclosure. In other words, it is a bill to discover facts, which cannot be proved, according to the existing forms of procedure at law. *The jurisdiction of a court of equity, in this regard, rests upon the inability of the courts of common law to obtain, or to compel such testimony to be given. It has no other foundation; and whenever a discovery of this kind is sought in equity, if it shall appear that the same facts could be obtained by the process of the courts of common law, it is an abuse of the powers of chancery to interfere. The courts of common law having full power to compel the attendance of witnesses; it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness, to prove what is sought from the conscience of an interested party.* Courts of chancery have then established rules for the exercise of this jurisdiction, to keep it within its proper limits, and to prevent it from encroaching upon the jurisdiction of the courts of common law.
>
> "The rule to be applied to a bill seeking a discovery from an interested party, is, that the com-

> plainant shall charge in this bill, that the facts are known to the defendant, and ought to be disclosed by him, and *that the complainant is unable to prove them by other testimony;* and when the facts are desired to assist a court of law in the progress of a cause, it should be affirmatively stated in the bill that they are wanted for such purpose. Such is the rule in Virginia; as may be seen in Duval *v.* Ross, 2 Munf. 290; and in Bass *v.* Bass, 4 Hen. and Munf. 478: and it will be applied to the construction of the third section of the statute against usury, upon the authority of her own courts."

This same rule was acted upon in the case of Rindskopf *v.* Platto, 29 Fed. Rep. 130, in which it was held upon the authority of the case of Brown *v.* Swann that a bill for discovery of facts the knowledge of which was confined to the defendant, and a disclosure of which was sought in order to aid the plaintiff in the bill in establishing a right to recover in a pending action at law against the defendant, could not be maintained because of the fact that the plaintiff in the bill could obtain disclosure of these facts on the trial of the action at law by calling the defendant as a witness."

Dyer, District Judge, after quoting from the opinion of this Court in Brown *v.* Swann, said:

> "What is sought by this bill is a discovery, by the defendant, of certain facts which it is believed are in his possession, and within his knowledge. All that would be accomplished if this bill were to be maintained, and a decree for a discovery made, would be a disclosure of those facts by the defendant. In the suit at law, as the present Statutes of the United States provide, the defendant may be called as a witness, may be just as effectually examined as any other witness, and may be compelled to make just as complete a discovery as, in the absence of this statute, he could be compelled to make under a bill of discovery. This being so, it follows that this bill is not maintainable."

There can be no doubt of course that a procedure exists under which the production of the books and papers of the defendant at the trial could be enforced, and their contents given in evidence, provided, of course, that no right of the defendant would be thereby ignored or violated.

Ample provision is made in the Interstate Commerce Act and subsequent acts, which have been already referred to, for the production upon the trial of a case arising thereunder of the books and papers of a carrier defendant in the action under and by virtue of a *subpœna duces tecum*. We submit, therefore, that the petitioner having available process which would secure the production at the trial of the defendant's books and papers could not have resorted to any proceeding in equity to secure their production and consequently cannot avail itself of the procedure authorized by Section 724 of the Revised Statutes.

Nor can it be claimed, even if this could be regarded, as an argument against the position for which we have just been contending, that the petitioner would derive some advantage from an inspection of the defendant's books and papers before trial, which he would be deprived of if his right were restricted to a production of the books at the trial under the process of a *subpœna*.

The only ground upon which the plaintiff in its petition sought to justify its demand for an inspection before trial was that it would be thereby enabled to prepare "a tabulated statement prior to the calling of the cause for trial," and that thereby "much time and labor would be saved and the trial of the cause much expedited and hastened without injuring in the least the defendant company."

It is a novel proposition that a Court of Equity will decree discovery simply in order to save the time of some other court, and even if such a theory were admissible, it could have no application to the present case, because any computation which the plaintiff might make from the distribution sheets of the defendant would be inadmissible in evidence and the sheets themselves would,

therefore, upon the trial have to be given in evidence in order that their contents might be considered by the jury.

We submit, therefore, that the petitioner having failed to show any reason why an inspection in advance of trial should be accorded to it, and it appearing that it is amply able to secure under the process of a *subpœna duces tecum* the production of the papers sought at the trial, was debarred from resorting to the procedure embodied in Section 724 of the Revised Statutes.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Defendants.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

No. 284. October Term, 1907.

IN THE

Supreme Court of the United States

Pennsylvania Coal and Coke Company, Petitioner,

vs.

A. J. Cassatt, John B. Thayer, Charles E. Pugh, *et al.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF DEFENDANTS.

FRANCIS I. GOWEN,
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Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

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Pennsylvania Coal and Coke Company, Petitioner.

vs.

Alexander J. Cassatt, John B. Thayer, Charles E. Pugh, W. W. Atterbury, Michael Trump, R. M. Patterson, J. G. Searles, George W. Creighton, William W. Strong, Oscar A. Knipe, William J. Bingham, A. E. Fitler, William A. Thompson, Charles R. Strong, Charles Kingsmore, A. D. Roberts and R. L. Head.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF DEFENDANTS.

ARGUMENT.

The order of the Circuit Court it is claimed was justified by Section 724 of the Revised Statutes, which provides as follows:—

> "In the trial of actions at law, the courts of the United States may, on motion and due notice

thereof, require the parties to produce books of writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him in default."

It is submitted that this section did not justify the order in question, for the following reasons:—

1. The order is directed to and against individuals who were not parties to the cause, while the power conferred by the section is to "require the parties to produce, &c."

2. The order directed the production of books and papers for the inspection of the petitioner prior to the trial of the cause, while the section empowers the court to order production at the trial only.

3. The order directed the production of papers the possession of which either by the persons against whom the order issued or by the defendant in the action had not been established or shown.

4. Under the express terms of such section orders can be made thereunder for production of books and papers only "in cases and under circumstances where they (i. e., the parties) **might be compelled to produce the same by the ordinary rules of proceeding in chancery." The order made infringes this limitation in two respects.**

(a.) **The production of the papers embraced in the order was directed in order to assist the petitioner in establishing a case of discrimination forbidden by the Inter-**

state Commerce Act which if established would justify criminal proceedings against the defendants. Under such circumstances their production could not have been compelled by any proceeding in equity and consequently an order under Section 724 was not justified.

(b.) **If the defendant could be required to produce its papers at all, in view of the purpose for which their production was sought, the petitioner by the express terms of the Interstate Commerce Act could enforce their production by and through a *subpoena duces tecum*, and having this method available could not have resorted to proceedings in equity and consequently cannot avail itself of the provisions of Section 724.**

Before, however, considering the objections to the validity of the order, the right of the Circuit Court of Appeals, and consequently of this Court, to consider and pass upon its validity and regularity should be considered, for if the contention urged by the petitioner in the Court of Appeals and repeated in this Court should prevail and it should be held that the order made by the Circuit Court was not a final one to which a writ of error would lie, then necessarily it would seem to follow that all that the Court of Appeals could have done would have been to dismiss or quash the writ of error upon the ground that it had not jurisdiction to hear and determine the case, and the action of this Court we assume would have to be restricted to a reversal of the order made by the Court of Appeals solely upon the ground that that Court had no jurisdiction to pass upon the questions raised by the appeal. Consequently if the conclusion of this Court should be that the order of the Circuit Court was not a final one justifying an appeal, we assume that it would consider that it was relieved from the necessity of considering the question of the validity of the order of the Circuit Court on its merits, and any discussion of the matters affecting the validity of the order would therefore be unnecessary.

The order of the Circuit Court was, however, we submit a final one and one consequently which the Court of Appeals was justified in reviewing.

The courts have uniformly regarded the procedure authorized by Section 724 of the Revised Statutes as a substitute for proceedings in equity in the nature of discovery.

We do not suppose that even our adversaries will contend that if the petitioner had been at liberty to proceed in equity by a bill of discovery and had obtained an order or decree similar to that which it has obtained under Section 724, an appeal from such order or decree would not have been allowable. In such a case the defendant undoubtedly could have appealed and would not have been relegated to an appeal from any decree which might be entered against him in the action for the furtherance of which the discovery had been sought and obtained. This proposition we do not believe will or can be seriously disputed.

But if the order now before the court would have been a final one in an equity proceeding of the character alluded to, upon what theory can it be claimed that it is not a final one under the procedure authorized by Section 724 of the Revised Statutes? The question of its finality it would seem ought not to be determined with reference to the character of the proceeding in which it was made, but should be determined solely with reference to the question whether the Court has finally by its order or decree disposed of the controversy with respect to which the order was made.

Unquestionably the order before the court was a final one, in the sense that it exhausted the power of the court in the proceeding in which it had been made. Even failure, on the part of the defendants, to comply with its directions, would not open the door to further proceedings or orders, for such failure would not subject them to any pains or penalties whatsoever. The penalty of such disobedience would be visited upon the defendant

in the main action, for by the provisions of Section 724 failure to produce books and papers by a defendant when ordered authorizes "entry of judgment against the defendant by default" and this is the only penalty that follows such failure.

> "Whenever in a cause there is a determination of some question of right, a decision is final, in the sense in which an appeal from it is permitted, if it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the court, so that to bring the cause again before the court for decision will not be necessary. Mackeye *vs.* Mallory (decided by this court February 23d, 1897), 24 C. C. A., 420, 79 Fed., 1; Rouse *vs.* Hornsby, 14 C. C. A., 377, 67 Fed., 219; Gumbel *vs.* Pitkin, 113 U. S., 545, 5 Sup. Ct., 616; Central Trust Co. *vs.* Grant Locomotive Works, 135 U. S., 207, 10 Sup. Ct., 736."

Wallace, Circuit Judge, in Butler *vs.* Fayerweather, 91 Federal Reporter, page 458.

Tested by this definition, the order involved in the present proceeding was certainly final, for beyond all controversy it did finally and completely dispose of the question of the right of the petitioner to have the defendant's papers submitted to its inspection in advance of trial and left open no question or matter for further consideration or action by the court and it was final, therefore, both as to the defendant and those to whom it was directed.

But it will doubtless be argued that the present case is ruled by the decision of this court in the case of Alexander *vs.* United States, 201 U. S. Reports, page 117. The two cases, however, are clearly distinguishable.

In that case it appeared that a suit was pending in a Circuit Court of the United States under the Anti-Trust Act, in which testimony was being taken before an examiner.

The Circuit Court made an order requiring a witness to answer certain questions and to produce certain books before such examiner, and from this order the witness appealed. This court dismissed the appeal holding that the order was not a final one. The decision was rested upon the proposition that an order made upon a witness to answer questions or produce documents, either upon the trial of the cause or before an examiner, was not an order made in any case or controversy between the witness and the party at whose instance it had been entered, but was merely an interlocutory order in the main cause.

Mr. Justice McKenna, who delivered the opinion of the court, adopted as a correct statement of the law upon the subject the following extract from an opinion of Circuit Judge Van Deventer, rendered in a case in which that Judge had been called upon to deal with a somewhat similar question:—

> "I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the government, as a sovereign, vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witness in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

It will be observed that this opinion concedes that when a final order is made against a witness in any proceeding which can be regarded as a suit or controversy, to which he is a party, the right to appeal arises.

This indeed had been determined by the previous decisions of this court in the cases of Interstate Commerce Commission *vs.* Brimson, 154 U. S., 447, and Interstate Commerce Commission *vs.* Baird, 194 U. S., 25.

In both these cases the question involved related to the right of a Circuit Court to compel answers and production of documents by witnesses, and in both this court considered and acted upon appeals which had been taken from the orders made, and had consequently dealt with these orders, not as interlocutory in the proceedings in which the testimony was sought, but as final in the separate proceedings against the witnesses. "Those cases," says Mr. Justice McKenna, referring to the Brimson and Baird cases, "rested upon statutory provisions which do not apply to the proceedings at bar, and while there may be a resemblance to the latter there are also differences."

What we understand the learned justice meant by this was, that the orders in the Brimson and Baird cases were made in proceedings against the witnesses which were distinctly substantive proceedings of themselves, and were not merely orders made upon a witness called to testify in the main proceeding, for the court will observe that Mr. Justice McKenna saw no distinction between the case of a witness called to testify upon a trial and that of the witness called to testify before an examiner. "Why," he says, "should greater rights be given a witness to justify his controversy when summoned before an examiner than one summoned before a court? Testimony at times must be taken out of court."

The effect of the decision in the Alexander case, taken in connection with the decisions in the Brimson and Baird cases, may, we submit, be thus summarized:—

That when an order upon a witness to answer questions or produce documents is made in a proceeding against the witness, which amounts to a case or controversy within the generally accepted meaning of those terms, an appeal from such order will be sustained if the order is a final one; that where, however, the order upon the

witness is made when he is upon the stand or before an examiner, such order cannot be appealed from because no case or controversy, to which the witness is a party, has arisen, but an appeal will lie at the instance of the witness when an order punishing him for refusing to answer or produce the documents has been made, because then an order has been made in a case or controversy to which the witness is a party.

It is confidently submitted that the present is within the first above mentioned class of cases, and that, consequently, the appeal to the Circuit Court of Appeals was properly taken, and that that court acquired jurisdiction of the case.

Bearing in mind that the question at issue in the proceeding in which the order was made was the right of the petitioner to inspect in advance of trial the defendant's papers, it will at once be perceived that if the defendant can only have this question reviewed upon the appeal from the judgment in the main action, it will necessarily be deprived of any effective appeal, for in the meantime its right to an exemption of its papers from inspection by its adversary will have been lost and the appeal, therefore, would accomplish nothing, for the wrong would already have been done if the petitioner had no right to the inspection which the order granted.

But it is not perceived how on such appeal any question could be raised as to the validity of the order for inspection.

Assume that in the present case, an appeal not being allowable, the papers had been submitted to inspection of the petitioner. Having secured all the information desired the petitioner at the trial obtains the papers through a *subpœna duces tecum* and the trial is conducted without any reference to the order for inspection or the inspection itself. If the trial should terminate in a judgment for the defendant, manifestly no review of the validity of the order of inspection could be secured. And would not the same be true if the judgment should be in the plaintiff's favor. This judgment would have

been obtained solely upon the evidence adduced at the trial and how could it be successfully attacked because of something that had transpired prior to the trial which so far as the Record went had had no effect whatever upon the result.

If the judgment could be reversed because of the error committed in requiring the defendant to submit its papers for inspection, the error would equally affect any subsequent trial, for the information wrongfully obtained through the means of an inspection not authorized would operate to the disadvantage of the party whose papers had been inspected in any and all trials that might thereafter take place.

But it may be said that the argument goes too far, and that it will apply equally to papers produced and given in evidence at the trial either under an order made under Section 724 or under the ordinary process of a *subpœna duces tecum*. The answer, however, to this is that theoretically, and, indeed, as a matter of fact, a party who is compelled at a trial to produce his papers does have a right to have reviewed on appeal from any order made in the course of the trial compelling such production.

It would, however, involve an unwarranted and intolerable interference with the trial of causes, if the trial had to be suspended until this appeal could be heard and determined, and *ex necessitate*, therefore, its hearing is deferred until the termination of the trial.

Where, however, the orderly administration of justice does not require that the hearing of an appeal should be thus deferred, there would seem to be no reason why the hearing should be postponed to the detriment of the party affected by the order.

Assuming, then, that the order of the Circuit Court was a final one, and that, consequently, this Court is at liberty to consider and pass upon the validity of the same, the questions affecting its validity and regularity

remain for consideration, and these will be taken up in the order in which they are stated at the head of this brief.

I. The order is directed to and against individuals not parties to the cause.

Under Section 724 of the Revised Statutes, the court is only authorized to require *the parties* to produce books or writings in their possession or power. The defendants were not parties to the action, and therefore the court had no power to enter such an order against them.

Indeed not only were they not parties but there is no evidence that any one of them was an officer or agent of the defendant. The order itself refers to them as such, but there is no evidence to support this: not even an averment to that effect in the petition upon which the order was made. In the order many of them are simply designated as "agents and employees of the Pennsylvania Railroad Company," and it nowhere appears that the papers embraced in the order are in the custody of any of them.

The Record also discloses that the order was made without any notice to them. They were not made parties to the proceeding in which the order was made and were not parties to the main action. The petition upon which the order was made did not even aver or allege that the papers desired were in their custody or control. The allegation made therein in respect to some of the papers, viz., the daily car distribution sheets simply was to quote therefrom "That said daily distribution sheets are in the custody and under the exclusive control of the defendant company." There is no averment that the other papers called for were in the custody of the corporation defendant or of any of the defendants.

So that we thus have an order made against a large number of individuals, none of whom are shown to have

any connection with the defendant in the action who may be perfectly unable for aught that appears to produce the papers called for. Even if it had appeared that they stood in some relation to the defendant they were not afforded the slightest opportunity to show cause why an order should not be made against them. Even if it were permissible to assume or infer that they were in some way connected with the company, it is inconceivable that they all—and the order went out against seventeen—had such control over the papers sought as to warrant an order against them for the production of the same.

It is clear, therefore, we submit, that the order was invalid because directed against persons concededly not parties to the cause and who had never had an opportunity afforded to them to show cause against its issuance.

But even if it had appeared that the defendants were officers and agents of the defendant in the action and in charge of the papers sought, an order against them was not warranted by the section under consideration.

That the section is a highly penal one cannot well be denied. By its terms judgment goes against the party who fails to comply with any order made pursuant to it.

The terms of the Section, therefore, should be strictly followed and adhered to, and orders made against parties to causes and no others, otherwise the record would fail to sustain the judgment, for it is inconceivable that judgment could properly go against a party to a cause upon proof that an agent or employee of his had failed to comply with an order to produce papers made under the section in question.

Will the court assume that a party to a cause can compel an agent or employee to obey an order made under this section and therefore conclusively presume that any failure of the agent or employee to obey the order must be ascribed to and treated as disobedience of the party himself.

It is monstrous to assume that the severe penalty of

judgment by default may be entered against a defendant by reason of the failure of his bookkeeper to comply with an order directed not to the defendant but to his bookkeeper. Yet that is what the practice sanctioned by the order of the court below would permit.

The illegality of such an order when directed to an agent of a party to the cause has been established in the State of Pennsylvania by a decision of the Supreme Court of that State construing a statute very like Section 724 of the Revised Statutes. The Pennsylvania Statute provides as follows:

"The Supreme Court, and several courts of common pleas in this state, shall have power, in any action pending before them, on motion, and upon good and sufficient cause shown, by affidavit or affirmation, and due notice thereof being given, to require the parties, or either of them, to produce books or writing in their possession or power, which contain evidence pertinent to the issue; and if either party shall fail to comply with such order, and to produce such books or writings, or to satisfy said courts why the same is not in the party's power so to do, it shall be lawful for the said courts, if the party so refusing shall be a plaintiff, to give judgment for the defendant as in cases of non-suit, and if a defendant to give judgment against him or her by default, as far as relates to such parts of the Plaintiff's or Plaintiffs' demand, or the Defendant's or Defendants' defence, to which the books or papers of the party is alleged to apply."

In Rose *vs.* King, 5 S. & R. 241, the lower court (under the provisions of this Act) had made an order upon an agent of the plaintiff for the production of certain papers at the trial of the cause. Upon a non-compliance with the order, the penalty prescribed by the Act, viz., a non-suit had been entered which was reversed by the Supreme Court of Pennsylvania on the ground that under the Act the order was defective if directed to a third person, even though he be an agent of a party to the record. Mr. Justice Gibson, delivering the opinion of the court said:—

"The affidavit is also defective, in not alleging that the deed was in possession of the plaintiffs. It was seen in the possession of Seely Huling, who was an agent of the plaintiffs; but whether as an agent or as the owner of it, and if the former, whether it remained in his possession at the time of its application, does not appear. If it were Seely Huling's own, or not entrusted to his care by the plaintiffs' it would not be peculiarly in their power; and, of course its production could not be enforced under the Act; but the party wishing to use it, would have to resort to the usual means of a subpœna with a *duces tecum*. The notice was served also at a period altogether too late, being only three days previously to the granting of the rule; and the rule itself was wrong, being made not only during the trial, but personally on Seely Huling, who was at most but an agent; it should have been on the plaintiffs in the cause. *A Court has no right to designate a third person, not marked as such on the record, as the real party, and proceed against him: It is the plaintiff of record who is to be nonsuited, and the rule must be against him.* It was unnecessary to treat Seely Huling as the party; if he were in fact so, the production of the paper might have been procured by a rule on the plaintiffs of record, which would have given the defendants all the benefit they were entitled to in any shape. If the paper came to his possession as an agent, it was to be considered in the power of the plaintiffs for all purposes beneficial to the defendants, in a proceeding on the act; if it were his own, he would, even though substantially interested, be bound to produce it on a subpœna."

Probably it will not be contended that in the case of an individual the order could go out against any other than the party himself, but it will doubtless be claimed that a different rule should prevail as to a corporation.

But upon what theory can a distinction be made between the two? If the order should go against the custodian of the paper to be produced there is no reason why it should go against the custodian of a corporation's papers but not against a custodian of an individual's or

of a firm's. If the custodian is the individual to be affected by the order what difference does it make whether his principal is a corporation or an individual?

The claim advanced in the court below was that the order was properly issued against defendants because of the rule that exists under which officers of a corporation are made parties to a bill of discovery directed against the corporation itself.

But the reason for this exception to the ordinary rule that a bill of discovery only lies against a party to a cause has no application to a proceeding under Section 724. When a corporation is called upon to make discovery it must do so under oath and as it can only answer under seal the practice was established of requiring answers from its officers and consequently of making them parties to the bill itself.

But this cannot possibly sustain or justify the procedure under Section 724 which was followed in the present case, for there is no reason at all why the order which it provides for should not go out against the corporation, and this especially is true when it is considered that failure to obey the order does not justify any proceeding for disobedience—so that nothing could be gained by having the individual amenable to the pains and penalties consequent upon disobedience—the only consequence thereof being a judgment against the party to the cause.

There cannot be any doubt therefore, we submit, that an order of this character directed against employees of a party to the cause and not against such party itself is not authorized by Section 724 or any other provision of the Revised Statutes, and this was the view of the Circuit Court of Appeals. (Record, page 31.)

The order was invalid because it directed the production of the papers referred to therein and the submission of the same to the inspection of the petitioner before the trial.

The power conferred by the section is exercisable "*in the trial* of actions at law." If it had been the intention to confer power to compel production in advance of trial why say "in the trial of actions"? "In actions at law the courts of the United States may," &c., would have been the natural way of conferring the power if it was to be exercised to the extent claimed by petitioner.

The insertion of the words "in the trial of" indicates very clearly that the power conferred was not to be exercisable at any other stage of the action, and the whole procedure contemplated by the section is consistent with this theory of the extent of the power conferred by it.

The order authorized is simply to produce—which naturally means at the trial,—not to submit to inspection of the opposite party. If the production is to be at the trial the court can then deal with the papers produced as it would with books and papers produced under a *subpœna duces tecum*. No further grant of power therefore is necessary to make the production effective. But in the case of production before trial, the mere act of production accomplishes nothing unless the court exercises a power not conferred by the section and couples with the order to produce an order to submit the papers to the inspection of the party desiring their production.

The books and writings to be produced are those "which contain evidence pertinent to the issue," thus clearly indicating that they are to be produced in order that they or their contents may be given in evidence. If orders for inspection of papers in advance of trial were contemplated the section would not have thus defined the papers covered by it. The definition would have been enlarged so as to include papers in the possession of one party which his adversary was under the chancery procedure entitled to inspect.

Again the procedure which the section authorizes in the event of a failure or refusal to comply with the order naturally adapts itself to proceedings had at the trial; the penalty is a judgment in favor of the party obtaining the order to be entered on motion. "If a plain-

tiff fails to comply with such order the court may on motion give the like judgment," &c., is the language of the section.

If this judgment is to follow a failure to produce for inspection before trial, surely some procedure would have been provided for designed to inform the court as to what had transpired. Suppose a case in which a conflict should arise as to whether the order had been obeyed, what method does the section provide or even contemplate for the determination of the same?

No doubt it is possible to construct theories and to import into the section by implication powers not specifically confirmed, which would be sufficient to justify orders under the section for inspection in advance of trial, but we submit that if the language of the section is considered solely with the desire and purpose of ascertaining what power its framers intended to confer, the only conclusion that can fairly be reached is that for which we are contending, viz., that "in the trial of actions at law" means "in the trial" and not "before the trial."

It is undoubtedly true that a number of the Circuit Courts have construed the section under consideration as warranting orders for inspection before trial while others have given it the more limited and, as we believe, correct interpretation.

But in no case in which this point has been at issue has the question received the thoughtful and thorough consideration which it received at the hands of the Circuit Court of Appeals in the present case, and the opinion of that court so conclusively establishes the correctness of the decision to which it came that we do not feel warranted in attempting to add anything to what has been so well said. That part of the opinion which deals with this point commences at the foot of page 31 of the Record and extends to the bottom of page 37.

We have already referred to the statute of Pennsylvania giving the power to compel production of books and papers.

That statute empowers the courts "in any action pending before them"—not "in the trial of any action" to direct a party to the cause "to produce books or writings in their possession and power which contain evidence pertinent to the issue," but the courts of that State have uniformly held that power to require production and inspection before trial has not been conferred upon them by this statute.

The reason for this restriction of the Act is thus stated in Thomas *vs.* Smith, 1 Troubat & Healy's Practice, Sect. 610. "The Act of February 25, 1798, is a highly penal statute, and although in terms it does not confine the rule to produce books and papers to the trial of the cause, yet the uniform practice under the act has so confined it. To extend it further would be accompanied with great danger and inconvenience. The right to inspect books and papers before the trial has therefore been confined to the cases where the parties have a common interest in the instrument of evidence called for. Where books and papers are produced before the court and jury, in a public court, there is an evident restraint upon making an improper use of them. Were we to establish the precedent asked for, every defendant who was willing to pay the plaintiff's demand, would resort to this move for the purpose of fishing up a defense or attack upon the plaintiff, from his books and papers * * *."

This statement of the law was adopted by the Supreme Court of the state in Raub *vs.* Van Horn, 133 Pa. St., 573.

The next objection to the order is that it directed the production of papers the possession of which by the plaintiffs in error or by the defendant in the action had not been established.

It will doubtless be conceded that the party seeking the order must show possession or control by his adversary of the papers sought.

In the present case the petitioner on April 6th, 1906, gave notice in writing of its intention to apply on April 11th, 1906, for the order which it subsequently obtained.

On page 17 of the Record will be found the acknowledgment by counsel for the defendant in the action of receipt of this notice which specifically reserved all rights of objection and especially that based upon insufficient notice.

It will be seen that the defendant was thus given five days in which to answer as to its possession of a great mass of papers included in which were certain so-called distribution sheets showing the distribution of cars made by the defendant among the shippers of coal located on its lines for the whole period of the action—a period of almost two years.

In the time available it was not practicable to ascertain whether every one of these sheets was still extant and available and this fact was set up in the answer to the petition for their production as will appear by reference to this answer which will be found at page 18 of the Record. After setting up other objections to the order prayed for the answer continued:

> "Subject to and without waiving the objections above stated to the granting of the order sought by the plaintiffs, this defendant further states and shows to the court that it is unable at the present time to answer as to its ability to produce the distribution sheets referred to in the plaintiff's petition for the entire period of time referred to therein. It has in its possession a large number of such sheets but until a more thorough examination is made than it has been able to make as yet in order to determine what sheets it has it cannot answer definitely as to this."

That the defendant was amply justified in declining to admit, pending a thorough examination, its possession of every one of the sheets called for must we submit be conceded in view of the penalty to which it would be subjected if it had admitted the possession of all the sheets, and then had been unable to produce one

or two of them. Its failure to produce one might have been followed by the entry of judgment against it under the provisions of the section.

Notwithstanding this averment of the answer the court on April 12th entered the order sought. In so doing we submit a most substantial and important right of the defendant was ignored, viz., the right to have no order made for the production of papers until at least it had had sufficient opportunity to ascertain whether it had them in its possession and consequently could produce them.

The order finally was not warranted because production of the papers was sought in order to assist in the establishment of discrimination forbidden by the Interstate Commerce act, in respect to which, if established, the defendant would have been subject to indictment, and because the plaintiff, if entitled to the papers at all, could have secured their production by and through a *subpœna duces tecum.*

The plaintiff's asserted right of action was based upon alleged acts of discrimination on the part of the defendant in violation of the Interstate Commerce Act. Under the tenth section of the act this alleged discrimination, if established, would have amounted to a misdemeanor not only on the part of the defendant, but as well on the part of any of its officers who participated in the acts constituting the discrimination.

If, therefore, the papers covered by the order, if produced, would establish facts tending to support the plaintiff's allegations, the enforcement of the order would unquestionably compel the defendant and its officers to themselves produce papers for the purpose of establishing the existence of an act or acts which would render them liable to indictment and fine.

The question, therefore, to be considered is whether Section 724 justifies an order for the production of papers under such circumstances.

We do not set up or claim that the order was invalid because it violated or ignored any immunity secured to either the corporation defendant or its officers under or by virtue of any provisions of the Constitution of the United States.

Our point is simply that Section 724 of the Revised Statutes does not authorize courts to order the production of papers under circumstances such as we have referred to.

It is not our contention that Congress *could* not have required the production of papers under these circumstances, for it is not necessary to consider this proposition; our contention is that it *has* not so legislated.

Section 724 does not provide that the courts shall have power to order the production of all papers, the production of which can be compelled or enforced; the authority which it confers is limited to orders for the production of papers "in cases and under circumstances" where their production could be compelled "by the ordinary rules of proceeding in chancery."

Our position may be thus summarized:—

The plaintiff in its pending action is seeking to recover damages because of alleged discrimination practiced by the defendant and forbidden by the Interstate Commerce Act.

This discrimination, if established, would subject the defendant and its officers, parties thereto, to indictment and fine.

Equity would not compel discovery of books and papers by a defendant under such circumstances.

Section 724 authorizes orders for the production of books and papers only in those cases in which a Court of Equity would make a similar order.

Unless the above statements can be controverted it inevitably follows, we submit, that the order of the Circuit Court was improperly made because not warranted by the provisions of Section 724.

The petitioner we understand contends that the above deduction as to the invalidity of the order is not justified because it claims, if we correctly understand its position,

(a) that the establishment of the discrimination alleged would not have subjected the defendant and its officers to indictment and (b) that by reason of certain circumstances, which will be presently alluded to, a Court of Equity would have been justified in making an order similar to that made by the Circuit Court, and consequently that Court was justified in making this order under the provisions of Section 724.

The petitioner's suggestion that the establishment of a case of discrimination would not subject the defendant and its officers to indictment is rested upon the proposition that because of the time which will elapse before a final determination is reached in the main action the Statute of Limitations would bar any prosecution before this period is reached.

Just why it should be assumed that any prosecution would be deferred until the determination of the action is not clear. The order as made required the production of the defendant's papers on the 12th day of April, 1906, and it is not asserted that on that date and immediately thereafter a prosecution could not have been instituted because of the time that had elapsed from the date of the transactions to which the papers related. The order, therefore, did require the defendant and its officers to produce books and papers for the inspection of the petitioner, the right to inspect which had been secured because of allegations that these when produced would tend to establish the acts of discrimination alleged, at a time when a prosecution was not barred, and thus required the defendant to furnish evidence in support of acts which it was claimed amounted to a misdemeanor, thus rendering it liable to indictment and fine.

The petitioner's contention in support of the proposition that a Court of Equity would have made a similar order to that made by the Circuit Court is rested upon the proposition that under certain provisions of the Statutes of the United States the defendant would have been protected from any criminal proceedings based upon facts ascertained or disclosed by reason of the submission by it of its papers to the inspection of

the plaintiff and its agents pursuant to the order of the Circuit Court, and that this fact would have led a Court of Equity to make the order which otherwise it would not have made.

The first of these statutes referred to is the so-called Elkins Act, approved February 19, 1903. This act provides that in proceedings under the Interstate Commerce Act the Courts shall have power to compel the production of books and papers, and then grants immunity to any corporation which shall produce its books and papers in respect to any matter concerning which documentary evidence may have been produced.

The provisions of this act have reference solely to the production of books and papers upon the trial of causes. There is not a word in the act to indicate that it was intended to accomplish any other purpose. And the immunity granted extends only to transactions, matters or things concerning which the corporation may "*produce evidence documentary or otherwise.*" The immunity, therefore, as expressed, is only in respect to transactions, matters or things concerning which documentary evidence is produced.

The order in the present case does not direct the production of "documentary evidence;" it required the defendant to submit to the inspection of the plaintiff certain of its papers which may never themselves be offered in evidence in any case or proceeding.

Suppose the defendant had produced for the petitioner's inspection the papers embraced in the order and that it appeared from these that the defendant had been guilty of a violation of the Interstate Commerce Act, and an indictment followed. Could the defendant possibly set up the provisions of the Elkins Act just alluded to as barring the prosecution? Clearly not for the papers themselves would not have been given in evidence in any case and would not, therefore, have become documentary evidence within the meaning of that term as used in the Elkins Act.

What we have already said applies equally to the Act

of February 25, 1903, which the petitioner also refers to as affording immunity as against any prosecution resulting from the submission by the defendant of its books to the inspection of the plaintiff.

Section 860 of the Revised Statutes is also cited upon by the petitioner.

This Section provides that "No pleading of a party nor any discovery of evidence obtained from a party or witness * * * shall be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture."

The petitioner concedes that under the decision of this Court in Counselman *v.* Hitchcock, 142 U. S. 547, this section does not afford the complete immunity to which a party is entitled before he can be compelled either to be a witness against himself or to produce books and papers which will tend to criminate him.

The reasons given by this Court for reaching the conclusion at which it arrived in that case apply very strongly to the present case.

After referring to the extent of the immunity afforded by the Section, this Court, speaking by Mr. Justice Blatchford, said:

> "This of course protected him against the use of his testimony against him or his property in any prosecution against him or his property in any criminal proceeding in a court of the United States. But it had only that effect. It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

This reasoning applies quite as strongly to a case in which a defendant is required to submit his or its papers to inspection as to the particular case with which the court was dealing.

It will be observed moreover that Section 860 deals only with a "pleading of a party" and "discovery of evidence obtained from a party or a witness."

The present case, of course, has no relation to a pleading of a party, and we submit that the submission by the defendant of its books and papers to inspection would not have constituted a "discovery of evidence," for as we have already pointed out the papers themselves are not given in evidence at the time of their production for the purpose of inspection and hence the facts elicited from them have not been secured or drawn out through any "discovery of evidence." . . .

We have thus dealt with the various matters set up by the petitioner as a reason why the Circuit Court was justified in ignoring the usual rule that a Court of Equity will not decree discovery of facts, the knowledge of which may tend to subject the person making discovery to criminal prosecution.

The rule itself is of course well settled and is thus stated in Bispham's Principles of Equity at Section 562:

> "A defendant need not answer matters which tend to criminate himself or expose him to a penalty or forfeiture, whether the matter inquired of be the broad and simple fact of crime or penalty or whether it be simply an incidental fact which may form a link in the chain of evidence if anyone chooses to indict him."
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> See also Story on Equity Jurisprudence, Section 1494;
>
> Story's Equity Pleading, Section 553.

The rule to which we have just referred has been uniformly regarded by the Circuit Courts as controlling proceedings under Section 724. In Newbold *v.* American Novelty Company, 108 Fed. 341, it was determined that

in a *qui tam* action to recover the penalty prescribed by Section 4901 of the Revised Statutes for falsely marking an article as patented, the defendant could not be compelled, under Section 724, to produce books or papers containing evidence against him either for use in evidence at the trial or for inspection of the plaintiff before the trial.

Said BROWN, District Judge:—

> "The provision of Section 724 above quoted, expressly limits its application to cases and circumstances where the parties "might be compelled to produce the books and papers by the ordinary rules of proceeding in chancery." But no such production as here sought would be required by the ordinary rules of proceeding in chancery for use in an action for penalties like the present. "It is a universal rule in equity," says Story, J., "never to enforce either a penalty or a forfeiture; and a bill of discovery will not lie in a case which involves a penalty or a forfeiture."

In Finch *vs.* Rikeman, 2 Blatch., 301, in an action brought to recover damages for the infringement of a patent the court refused to made an order under Section 724 on the defendant to produce his books and papers, as the effect of the evidence would be to subject the defendant (under Section 14, of the Act of July 4, 1836) to a penalty of three times the amount of the damages suffered by the plaintiff. Betts, J., said:—

> "This motion demands the production of defendants' books, to establish the quantity and value of the manufactures of machinery made by the defendants, which manufacture is charged in the declaration to be an infringement of the plaintiff's patent. The effect of the evidence sought for will be not only to enable the plaintiff to recover his entire damages, but its direct consequence will be to subject the defendants to a penalty of three times the amount of those damages, under

> Sec. 14 of the Act of July 4th, 1836, (5 U. S. Stat. at Large, 123). We think it against the rules of Equity, to allow a bill of discovery in such a case, unless the bill relinquishes all claim to the penalty which may be superinduced by the production and exhibition of the books, and, for that cause, the motion must be denied."

In U. S. *vs.* National Lead Co., 75 Fed., 94, in an action brought by the United States to recover back certain drawbacks paid the defendant upon certain imports of raw material upon the allegation that the manufactured article had been exported, which allegation it was claimed was false, a petition having been filed under Section 724 asking for the production of books and papers prior to trial, the court held that as the documents, if produced would tend to show the commission of a crime by the defendants, no order for production should be made, Green, J., saying:—

> "But there is a more serious objection to the granting of this motion, and which is radical in its nature. Although the pending suit is, in terms, simply one to recover money had and received by the defendant to and for the use of the plaintiff, yet it is evident that the real gravamen of the action is the alleged fraud and misfeasance of the officers, agents, and servants of the defendant corporation, committed by them, or some of them, in the name and for the benefit of the corporation, in the making and presenting of false, deceitful, and fraudulent claims for drawbacks or rebates of duties on imported lead ore, and thus unlawfully obtaining the very large amounts of money involved in this suit. To obtain such rebates or drawbacks, the statute requires the claim to be verified by oath. This was done in the claim made by the defendant. If, therefore, the allegations of plaintiff are true, the officers and agents of the defendant corporation who were guilty of mak-

ing these fraudulent claims have laid themselves open to criminal prosecution, and the corporation itself has become liable to the penalties and forfeitures affixed to such acts by the statute. Now, the plaintiff alleges that the evidence of these unlawful acts is to be found in the books of the defendant, and for that very reason asks for the order requiring their production. But because of that very reason the order asked for ought not to be granted. It is not necessary to base the refusal to grant the order, under these circumstances, upon the protective clauses of the Constitution of the United States. Just, and in fact peremptory, reasons for such refusal are to be found clearly written in the statute, which confers upon the court the power sought to be invoked. Such power is, by the words of the statute, to be exercised only under circumstances where the parties might be compelled to produce the books and writings "by the ordinary rules of proceedings in chancery;" in other words, the order asked for is to be made only where circumstances would justify a discovery in proceedings in equity. This limitation upon the exercise of this power to require the production of books and writings absolutely bars the granting of the present motion, for it is a cardinal rule of chancery that a discovery will never be decreed when it might tend to convict the party of a crime or work a forfeiture of his property. Nor is this rule confined to cases in which discovery must necessarily subject the defendant to pain and penalties, but it is broadly extended to cases where it may do so. The discovery sought may, indeed, have no immediate tendency to criminate the defendant, but that does not militate against the enforcement of the rule that the defendant is not bound to accuse himself of crime, or to furnish any evidence whatever which shall lead to any accusation of that nature. I Daniell, Ch. Prac. 563; March *vs.* Marsh, 16 N. J. Eq. 391. As

was tersely said by Mr. Justice Bradley in Boyd *vs.* U. S. 116 U. S., 616, 6 Sup. Ct. 524, in commenting upon this statute:

"'Compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.'

"Hence it is clear that this statute, instead of authorizing the order asked for by the plaintiff, requires its denial. Equity has placed its veto upon such applications when made under circumstances which characterize this case, and, if equity would refuse to decree discovery, this court is powerless to order it to be made."

The further objection remains for consideration that the production of the defendant's books and papers at the trial can be enforced through and by a *subpœna duces tecum*, and hence a Court of Equity would not have entertained a bill designed to compel the defendant to make discovery of the contents of such books and papers and consequently a proceeding under Section 724 having the same end in view is not warranted.

It is well settled, we submit, that a bill for discovery in aid of an action at law cannot be maintained where the facts sought may be secured by an examination of the adverse party as a witness in the action itself.

The rule to this effect was acted upon by this Court in the case of Brown *v.* Swann, 10 Peters, 497. In that case this Court had to consider the sufficiency of a bill, to which a demurrer had been filed, which sought under a procedure authorized by a statute of Virginia to compel a lender of money to disclose what interest he had received in order that the borrower might be

relieved from the payment of anything more than the lawful rate of interest.

The following extract from the opinion delivered by Mr. Justice Wayne clearly indicates the view adopted and acted upon by the Court:

> "When the Legislature of Virginia passed the statute, it fixed the nature and extent of the jurisdiction of a court of equity to compel a discovery, upon oath, from an interested party, in a suit either at law or in equity, and the rules which equity had prescribed to itself to enforce its jurisdiction in this regard. It knew the distinction between a bill for such discovery and other bills in chancery; which are also bills for discovery. One of the former is a bill for the discovery of facts alleged to exist only in the knowledge of a person, a party to a private transaction with the person seeking the disclosure; essential to the establishment of a just right in the latter, and which would be defeated without such disclosure. In other words, it is a bill to discover facts, which cannot be proved, according to the existing forms of procedure at law. *The jurisdiction of a court of equity, in this regard, rests upon the inability of the courts of common law to obtain, or to compel such testimony to be given. It has no other foundation; and whenever a discovery of this kind is sought in equity, if it shall appear that the same facts could be obtained by the process of the courts of common law, it is an abuse of the powers of chancery to interfere. The courts of common law having full power to compel the attendance of witnesses; it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness, to prove what is sought from the conscience of an interested party.* Courts of chancery have then established rules for the exercise of this jurisdiction, to keep it within its proper limits, and to prevent it from encroaching upon the jurisdiction of the courts of common law.
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> "The rule to be applied to a bill seeking a discovery from an interested party, is, that the com-

> plainant shall charge in this bill, that the facts are known to the defendant, and ought to be disclosed by him, and *that the complainant is unable to prove them by other testimony;* and when the facts are desired to assist a court of law in the progress of a cause, it should be affirmatively stated in the bill that they are wanted for such purpose. Such is the rule in Virginia; as may be seen in Duval *v.* Ross, 2 Munf. 290; and in Bass *v.* Bass, 4 Hen. and Munf. 478: and it will be applied to the construction of the third section of the statute against usury, upon the authority of her own courts."

This same rule was acted upon in the case of Rindskopf *v.* Platto, 29 Fed. Rep. 130, in which it was held upon the authority of the case of Brown *v.* Swann that a bill for discovery of facts the knowledge of which was confined to the defendant, and a disclosure of which was sought in order to aid the plaintiff in the bill in establishing a right to recover in a pending action at law against the defendant, could not be maintained because of the fact that the plaintiff in the bill could obtain disclosure of these facts on the trial of the action at law by calling the defendant as a witness."

Dyer, District Judge, after quoting from the opinion of this Court in Brown *v.* Swann, said:

> "What is sought by this bill is a discovery, by the defendant, of certain facts which it is believed are in his possession, and within his knowledge. All that would be accomplished if this bill were to be maintained, and a decree for a discovery made, would be a disclosure of those facts by the defendant. In the suit at law, as the present Statutes of the United States provide, the defendant may be called as a witness, may be just as effectually examined as any other witness, and may be compelled to make just as complete a discovery as, in the absence of this statute, he could be compelled to make under a bill of discovery. This being so, it follows that this bill is not maintainable."

There can be no doubt of course that a procedure exists under which the production of the books and papers of the defendant at the trial could be enforced, and their contents given in evidence, provided, of course, that no right of the defendant would be thereby ignored or violated.

Ample provision is made in the Interstate Commerce Act and subsequent acts, which have been already referred to, for the production upon the trial of a case arising thereunder of the books and papers of a carrier defendant in the action under and by virtue of a *subpœna duces tecum*. We submit, therefore, that the petitioner having available process which would secure the production at the trial of the defendant's books and papers could not have resorted to any proceeding in equity to secure their production and consequently cannot avail itself of the procedure authorized by Section 724 of the Revised Statutes.

Nor can it be claimed, even if this could be regarded, as an argument against the position for which we have just been contending, that the petitioner would derive some advantage from an inspection of the defendant's books and papers before trial, which he would be deprived of if his right were restricted to a production of the books at the trial under the process of a *subpœna*.

The only ground upon which the plaintiff in its petition sought to justify its demand for an inspection before trial was that it would be thereby enabled to prepare "a tabulated statement prior to the calling of the cause for trial," and that thereby "much time and labor would be saved and the trial of the cause much expedited and hastened without injuring in the least the defendant company."

It is a novel proposition that a Court of Equity will decree discovery simply in order to save the time of some other court, and even if such a theory were admissible, it could have no application to the present case, because any computation which the plaintiff might make from the distribution sheets of the defendant would be inadmissible in evidence and the sheets themselves would,

therefore, upon the trial have to be given in evidence in order that their contents might be considered by the jury.

We submit, therefore, that the petitioner having failed to show any reason why an inspection in advance of trial should be accorded to it, and it appearing that it is amply able to secure under the process of a *subpœna duces tecum* the production of the papers sought at the trial, was debarred from resorting to the procedure embodied in Section 724 of the Revised Statutes.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Defendants.

In the opinion below it is stated:

"After issue was thus joined, and before the time for the trial of the action, the plaintiff filed in the Circuit Court a petition in which, after setting forth the nature of the action at law and declaring that the defendant, and Alexander J. Cassatt, president, John B. Thayer, fourth vice-president, and ten other specifically-named officers and employés of the defendant, had in their possession or power certain books and papers containing evidence pertinent to the issue, there was a prayer for an order requiring the defendant, and its said officers and employés, to produce said books and papers at the trial, and also for inspection by the plaintiff's representatives before trial. The application for the order was based on § 724 of the Revised Statutes, which is as follows:

"'In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.'

"On presentation of the petition to the Circuit Court, a rule was allowed requiring the defendant and its officers and employés named in the petition, to show cause before the court on a certain day why they 'should not produce on the trial of this cause' the books and writings above referred to; and also why they should not produce them at a certain time and place before trial 'and permit the plaintiff, its counsel and accountants, to inspect the same and take such copies as they may deem proper.' The defendant answered the petition setting forth (1) that the action was for the recovery of damages in the nature of penalties, and therefore that the defendant

was not obliged to produce its books and papers, either before or at the trial; (2) that even if the action were one in which the defendant could be required to produce its books and papers at the trial, it could not be required to do so before the trial; (3) that the petition did not describe with sufficient particularity the books and papers the production of which was desired, or state the facts which the books and papers would tend to prove; and (4) that the defendant could not produce any books which would show the rebates and drawbacks alleged to have been allowed to other companies, because they had not been so kept as to show any such allowances. With the petition and answer before it, the Circuit Court, on the return of the rule to show cause, 'adjudged, ordered and decreed' that Alexander J. Cassatt, president, John B. Thayer, fourth vice-president, and the ten other officers and employés of the defendant, 'produce on the trial of this cause' the books and papers described in the petition, and also that they produce them before trial at a specified time and place for the inspection of the plaintiff with leave to the plaintiff to make copies thereof."

To review this order, Cassatt and the other officers and agents of the Pennsylvania Company sued out, as individuals, a writ of error from the Circuit Court of Appeals for the Third Circuit, assigning as error (1) that the Circuit Court erred in entering the order requiring plaintiffs in error to submit to the inspection of the plaintiff below and its counsel, prior to the trial of the cause, the books, records and papers referred to therein; and (2) requiring the production at the trial of said books, records and papers. The case was heard, together with two similar cases, one of which was entitled *Pennsylvania Coal & Coke Company* v. *Cassatt*, and is numbered 284 on the present docket.

The Circuit Court of Appeals gave an opinion in one case applicable to the three, and reversed the judgments of the Circuit Court with costs. 150 Fed. Rep. 32, 48. That court held that the order in question was a "final decision" within

§ 6 of the Judiciary Act of March 3, 1891; that the proceeding which resulted in the order was independent of and collateral to the main action, and the order therefore reviewable on a writ of error; that the corporation's officers and agents were not "parties" within Revised Statutes, § 724; that that section did not authorize an order requiring a party to produce books and papers before trial, but if such relief was desired it must be obtained by a bill of discovery. The present cause was then brought to this court on certiorari, and is numbered 283 on its docket. It was advanced for hearing and heard October 28, 29, together with No. 284, also brought up on certiorari.

Mr. John W. Griggs, with whom *Mr. Benjamin S. Harmon*, *Mr. George S. Graham* and *Mr. David L. Krebs* were on the brief, for petitioner:

The Circuit Court of Appeals had no power to review the order of the lower court.

The order was not a collateral matter distinct from the general subject of litigation affecting only the parties to the particular controversy, and finally settling the controversy, such as was referred to in *Brush Electric Company* v. *Electric Improvement Company*, 51 Fed. Rep. 557, but had distinct and important bearing on the general subject of the litigation. In fact, the order did not affect the respondents as individuals at all, being directed against them in their representative capacities. If the penalty prescribed in § 724 Rev. Stat. for disobedience of the order is not exclusive and the court has power to punish disobedience or enforce compliance, then, under the authority of *Alexander* v. *United States*, 201 U. S. 117, the order, prior to such action on the part of the court, is interlocutory in the principal suit.

On the other hand, if the penalty be considered exclusive, then the order, so far as concerns the respondents in certiorari, was mere *fulmen brutum* and they were in no way aggrieved. Still further, the order was rendered in a proceeding for the pro-

tection of the rights of the party to the suit for whose benefit it was made and for that reason not reviewable. *Doyle* v. *London Guarantee Co.*, 204 U. S. 599.

Mr. John G. Johnson, with whom *Mr. Francis I. Gowen* was on the brief, for respondents:

The order of the Circuit Court was a final one and one, consequently, which the Court of Appeals was justified in reviewing. The procedure authorized by § 724, Rev. Stat. is a substitute for proceedings in equity in the nature of discovery.

If the petitioner had been at liberty to proceed in equity by a bill of discovery and had obtained an order or decree similar to that which it has obtained under § 724, an appeal from such order or decree would have been allowable.

But if the order now before the court would have been a final one in an equity proceeding of the character alluded to, it is a final one under the procedure authorized by § 724. The question of its finality, it would seem, ought not to be determined with reference to the character of the proceeding in which it was made, but should be determined solely with reference to the question whether the court has finally by its order or decree disposed of the controversy with respect to which the order was made.

The order was a final one, in the sense that it exhausted the power of the court in the proceeding in which it had been made. Even failure, on the part of the defendants, to comply with its directions, would not open the door to further proceedings or orders, for such failure would not subject them to any pains or penalties whatsoever. The penalty of such disobedience would be visited upon the defendant in the main action, for by the provisions of § 724, failure to produce books and papers by a defendant when ordered authorizes entry of judgment against the defendant by default, and this is the only penalty that follows such failure.

The order involved in the present proceeding was final. It finally and completely disposed of the question of the right